AGREED RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 253.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, PLAINTIFF IN ERROR,

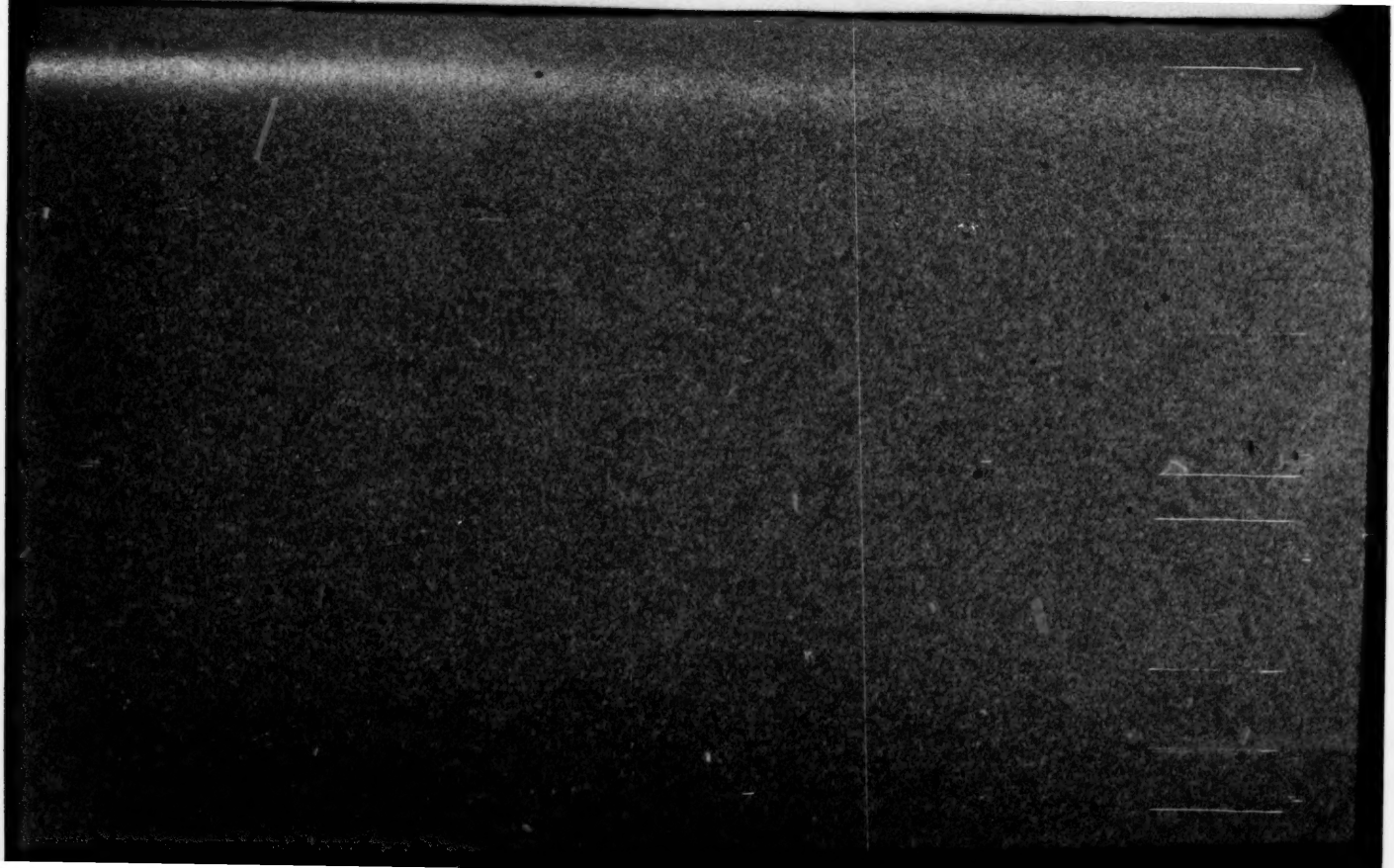
vs.

ALEXANDER ANDERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

RECORD FILED JANUARY 3, 1899.
AGREED RECORD FILED AUGUST 30, 1899.

(16,770.)



(16,770.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 223.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, PLAINTIFF IN ERROR,

vs.

ALEXANDER ANDERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1898.

1 Supreme Court of the United States, October Term, 1898.

FIRST NATIONAL BANK OF GRAND FORKS, N. D., Plaintiff in Error,
vs.
ALEXANDER ANDERSON, Defendant in Error.
} No. 223. Record.

Plaintiff in error respectfully submits the following statement of the errors on which it relies and the parts of the record which it deems necessary for the consideration thereof, to wit:

STATE OF NORTH DAKOTA, *County of Grand Forks,* } *ss:*

In District Court, First Judicial District.

ALEXANDER ANDERSON, Plaintiff,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, N. D., Defendant.

Amended Complaint.

The plaintiff complains and alleges:

I.

That—all times hereinafter mentioned the defendant was and still is a national banking corporation, duly organized and existing under the general act of Congress of the United States relating to
2 national banks, and doing a general banking business at the city of Grand Forks, in the State of North Dakota.

II.

That on the first day of October, A. D. 1890, the plaintiff was the owner in fee of those tracts or parcels of land lying and being in the county of Grand Forks and State of North Dakota described as follows, to wit: The northeast quarter of section five (5) and the northwest quarter of section nine (9), in township one hundred and fifty-four (154) north of range fifty-three (53) west, containing three hundred and twenty (320) acres, more or less, according to the United States Government survey thereof, and that the value of the same was then and now is the sum of seven thousand dollars ($7,000).

III.

That on the said first day of October, A. D. 1890, the plaintiff bargained, sold, and conveyed said lands by deed of warranty to one John A. Willson, and delivered the said deed thereof to said John A. Willson, and in consideration thereof the said John A. Willson executed and delivered to the plaintiff his seven promissory notes for the sum of one thousand dollars ($1,000.00) each, signed also

by Sarah J. Willson, Annie Warren, and Henry Warren, Sr., with interest thereon, at the rate of nine per cent. per annum, from that date, payable annually, each dated October 1st, 1890, and due and payable respectively December 1st, 1891; Dec. 1st, 1892; Dec. 1st, 1893; Dec. 1st, 1894; Dec. 1st, 1895; Dec. 1st, 1896, and Dec. 1st, 1897; and said John A. Willson, Sarah J. Willson, Annie Warren, and Henry Warren, Sr., also executed and delivered to the plaintiff at the same time their certain mortgage upon said lands, and also certain other land therein described, in all four hundred and eighty (480) acres, securing the payment of said seven promissory notes to the plaintiff, his heirs, executors, administrators, and assigns.

IV.

That on or about the 6th day of April, A. D. 1891, the plaintiff borrowed from the defendant, at Grand Forks, North Dakota, the sum of two thousand ($2,000) dollars, and executed and delivered to the defendant his promissory note therefor, and at the same time deposited with the defendant, as collateral security for the payment of such sum, the seven promissory notes of J. A. Willson and others in favor of the plaintiff, hereinbefore mentioned, and endorsed the same to the defendant as such collateral security, and further executed and delivered to the defendant as part of such collateral security an assignment of the mortgage hereinbefore mentioned, which secured payment of said promissory notes.

3

V.

That on the third day of October, A. D. 1891, the defendant telegraphed to the plaintiff, at Seattle, Washington, requesting plaintiff to telegraph the defendant his best offer for a sale of said seven promissory notes by the defendant for the plaintiff to a third person, who was not named in said telegram from defendant to plaintiff; and thereupon the plaintiff telegraphed to the defendant as follows:

"To First national bank, Grand Forks, North Dakota:
Will give discount of five hundred dollars.
ALEX. ANDERSON."

VI.

That the defendant duly received said telegram from plaintiff, and thereupon the defendant wrongfully, and in violation of its duty as plaintiff's agent for the sale of said seven promissory notes, converted the said notes to its own use, and sold the same to itself, and on the 7th day of October, A. D. 1891, the defendant remitted to the plaintiff the sum of four thousand three hundred and ninety-seven and $\frac{48}{100}$ ($4,397.48) dollars, part of the proceeds of said sale, and mailed to the plaintiff his promissory note to the defendant for two thousand ($2,000) dollars, hereinbefore mentioned, and notified the plaintiff that defendant's commission for selling said seven promissory notes was the sum of thirty-five ($35) dollars; but the defendant has wholly failed to pay or remit or cause to be paid or

remitted to the plaintiff the balance due him on said sale or any part thereof, and the defendant is now indebted to the plaintiff and for said balance due him in the sum of twelve hundred and thirty-two and $\frac{52}{100}$ ($1,232.52) dollars, with interest thereon, at the rate of seven per cent. per annum, from and after the 7th day of October, A. D. 1891.

VII.

That at the time of the sale and conversion of said seven promissory notes, as aforesaid, the same were of the value of seven thousand six hundred and thirty ($7,630) dollars, lawful money of the United States, and that the same had not been paid to the plaintiff nor any part thereof.

VIII.

That on receiving said remittance of four thousand three hundred and ninety-seven and $\frac{48}{100}$ ($4,397.48) dollars and said note of two thousand ($2,000) dollars, the plaintiff forthwith mailed and deposited in the post-office at the city of Seattle, in the State of Washington, directed to the defendantat Grand Forks, North Dakota, a written notice that he would not accept said remittance and note as full payment of the proceeds of said sale, but that he should insist that defendant account to plaintiff for and remit to him the balance due him upon the full amount owing to plaintiff on said notes at the time of said sale, to wit, the sum of seven thousand six hundred and thirty ($7,630) dollars, less the five hundred ($500) dollars discount which had been agreed to by plaintiff, as aforesaid; but at the time of writing, mailing, and depositing said notice, as aforesaid, the plaintiff, relying on the defendant's telegram and letters aforesaid and being induced and misled thereby, believed the sale aforesaid had been made by the defendant, as plaintiff's agent, to some third person.

The plaintiff herein now elects to waive the wrongful element in the sale by defendant to itself, hereinbefore mentioned, for the purpose of maintaining this action as a suit in assumpsit to recover from the defendant the value of said promissory notes, as aforesaid, at the time of the conversion hereinbefore alleged, less the remittance already made, as aforesaid, with interest from the date of said conversion upon the balance, at the rate of seven per cent. per annum, pursuant to the opinion of the supreme court of the State of North Dakota rendered on the second appeal of this action to said court.

IX.

That prior to the commencement of this action the plaintiff demanded and caused to be demanded from the defendant payment of the balance of the proceeds of the sale of said seven promissory notes aforesaid, but that the defendant has refused and neglected and still refuses and neglects to pay the same or any part thereof to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant

for the sum of twelve hundred and thirty-two and fifty-two one-hundre-th- dollars ($1,232.52), with interest thereon, at the rate of seven per cent. per annum, from and after the seventh day of October, A. D. 1891, together with the costs and disbursements of this action, and for such other and further relief as may be just.

Dated March 25th, A. D. 1893.

PHELPS & PHELPS
Plaintiff's Attorneys, Grafton, N. D.

Not verified.

STATE OF NORTH DAKOTA, } ss:
County of Grand Forks, }

In District Court, First Judicial District.

ALEXANDER ANDERSON, Plaintiff,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, N. D., Defendant. } Answer.

Comes the defendant and for answer to plaintiff's amended complaint:

I.

Denies each and every allegation therein contained, except as hereinafter specifically admitted.

II.

Admits paragraph one (1) of said complaint, but denies that said banking business included any agency for the sale of notes, mortgages, or other securities for other persons.

III.

6 Admits that October 1st, 1890, the record title to a part of the northeast quarter (N. E. ¼) of section five (5), township one hundred and fifty-four (154), range fifty-three (53), and part only of the northwest quarter (N. W. ¼) of section nine (9), township one hundred and fifty-four (154), range fifty-three (53), was in plaintiff and was by him conveyed to said Willson, and denies that said lands were then or have since been worth to exceed forty-six hundred and ninety-five and sixty one-hundredths ($4,695.60) dollars; admits the execution of the notes and mortgage on said lands and on the northeast quarter (N. E. ¼) of section four (4), township one hundred and fifty-four (154), range fifty-three (53), and alleges that said last-named land was not then and has not since been worth to exceed thirteen hundred dollars ($1,300) over and above the encumbrances thereon, and denies each and every other allegation in paragraphs two (2) and three (3) of said amended complaint.

IV.

Admits paragraph four (4) of said amended complaint.

V.

Admits that plaintiff telegraphed defendant: "Will give discount of five hundred dollars," and denies each and every other allegation of paragraph five (5) of said amended complaint, and especially denies that defendant ever telegraphed the request referred to in said paragraph or ever made request of plaintiff.

VI.

Admits that defendant received said telegram from plaintiff and that defendant wrote plaintiff as follows:

"GRAND FORKS, N. D., *Oct.* 7, '91.

Mr. Alex. Anderson, Seattle, Washington.

DEAR SIR: Your wire October 5th to hand.

Discount	$500.00
Half per cent. commission for selling the paper	35.00
Release and record of $80 mortgage given Gates	2.00
Record of assignment	1.50
1890 taxes you stipulated to pay	47.02
Attorney for examination of abstract	5.00
7 Continuing abstract	4.50
Your note	2,000.00
Exchange on New York	7.50
Draft to balance	4,397.48
	$7,000.00

Returns for J. A. Willson seven notes. In my judgment this is a good trade for you.

Yours, S. S. TITUS, *Cr.*"

and mailed therewith to plaintiff his $2,000 note and defendant's draft for $4,397.48, and denies each and every other allegation of paragraph six (6) of said amended complaint; and defendant especially denies that it was ever the agent of plaintiff for the sale of said notes or for any other purpose whatever or ever acted or undertook to act as such agent, or ever sold said notes or any thereof to itself, or ever wrongfully converted said notes or any thereof, or ever violated any duty or obligation to plaintiff, or that it is now or ever has been indebted to plaintiff in the sum of twelve hundred thirty-two and fifty-two one-hundredths dollars ($1,232.52) or any other sum or amount whatever.

VII.

Denies each and every allegation of paragraph seven (7) of said amended complaint, and denies that there ever was a sale and conversion of said notes or any thereof, as referred to, and denies that on October 7th, 1891, or at any time prior thereto said notes were worth seven thousand six hundred and thirty-two ($7,632.00) dollars or any other sum or amount in excess of six thousand dollars ($6,000).

VIII.

Admits that about October 13, 1891, plaintiff wrote defendant as follows:

"SEATTLE, WASHINGTON, *Oct.* 13, 1891.

First national bank, Grand Forks, N. Dak.

GENTLEMEN: Your letter, with enclosed draft for $4,397.48 and note of $2,000, is at hand, which I cannot accept. I wired
8 you that I would give a discount of five hundred dollars, and you make a discount of about $1,175. I did not agree to pay any other expenses. These notes call for $7,000.00 and $630 interest. I shall expect balance of money by return mail.

Yours respectfully, ALEX. ANDERSON."

and denies each and every other allegation of paragraphs eight (8) and nine (9) of said amended complaint, and especially denies that plaintiff was ever misled in any manner by defendant's telegrams and letters or any thereof or ever believed or acted or any belief that any sale had been made by defendant as plaintiff's agent to a third person, or ever recognized defendant as his agent for the sale of said notes or for any other purpose, or ever recognized any such sale, or ever considered or supposed that he was dealing with any person but defendant, or ever claimed, demanded, or in any way referred to or considered the proceeds of any sale or supposed sale by defendant as a basis for his claim against defendant; and alleges that plaintiff claimed the balance above referred to upon the basis and claim of a sale of said notes by plaintiff to defendant as principals.

IX.

Defendant alleges the truth and facts in relation to said transaction to be as follows and not otherwise:

From April 6th, 1891, to October 5th, 1891, defendant held said seven notes as collateral security to plaintiff's note of two thousand dollars ($2,000). During and prior to said period, by and in certain conversations, letters, and telegrams, plaintiff offered to sell said notes to defendant at certain discounts from face, and defendant offered to purchase them from plaintiff at other and greater discounts.

X.

That defendant expected to rediscount said notes in case it purchased them from plaintiff, and did not desire to purchase unless it had reasonable assurance of being able to rediscount them in terms profitable to itself. Its offer to purchase from plaintiff was made only when it had such assurance, and defendant in its letters and telegrams referred to third parties to whom it expected to sell or rediscount said notes in case it purchased them from plain-
9 tiff as a reason why a prompt answer was desired; that plaintiff was interested in such prospective rediscount or sale by defendant to a third party for the reason that the prospect or assurance of such sale constituted an inducement to defendant to pur-

chase from plaintiff, but for no other reason. Such rediscount or sale by defendant, in case any should be made, would in itself be a transaction wholly between defendant and a third person and to which plaintiff would be in no sense a party and in which plaintiff would have no claim, right, or interest whatever, and from said conversations, letters, and telegrams the foregoing facts became and were fully known by and between the parties to this action.

XI.

That throughout said transaction defendant, by its officers, understood all negotiations to be for an absolute sale of said notes by plaintiff to defendant, and understood and believed and still believed, and was and is justified in believing, that plaintiff so understood said negotiations; that all communications from defendant to plaintiff in relation thereto were with that intent and purpose, and defendant intended they should be, and believed and still believes that they were so understood by plaintiff, and that all said communications considered together disclose said intent; that all communications from plaintiff to defendant were understood and believed by defendant to be so intended by plaintiff, and defendant was and is justified in so believing, and said communications, considered together, show such intent.

XII.

That upon receipt of plaintiff's telegram and from the terms thereof, together with the proceedings, negotiations, and communications in relation thereto, and the conditions of the title to said lands and certain agreements made by plaintiff in regard to taxes, and the reasonable commission and expenses of clearing the title, defendant believed, and was justified in believing, that plaintiff intended said telegram as an offer to sell said notes to defendant for sixty-five hundred dollars (6,500), less plaintiff's note for two thousand dollars (2,000) and less the aforesaid taxes and expense of clearing the title to said lands, amounting to about one hundred two and fifty-two one-hundredths dollars ($102.52).

10 XIII.

Acting upon said belief, defendant accepted said offer or supposed offer and wrote the aforesaid letter of October 7th, 1891, with the enclosure of note and draft aforesaid, and defendant alleges that thereby was completed a contract by and between the parties hereto, whereby plaintiff sold to defendant all of said notes, and that plaintiff received payment in full therefor.

XIV.

That if there was any mistake of fact in regard to the terms of said offer, it was only as to the amount for which plaintiff intended to offer the notes for sale and the payment of said one hundred and two and $\frac{52}{100}$ ($102.52) dollars, and was not as to any question of agency. Neither plaintiff or defendant had then thought of or

referred to any agency, and if there was any mistake of fact, the same was made through the fault of plaintiff, and plaintiff did not seek to avoid said contract or rescind same on account of any such mistake.

Wherefore defendant demands judgment against plaintiff for its costs and disbursements in this action.

Dated Grand Forks, North Dakota, October 23, 1895.

BURKE CORBET,
Attorney for Defendant.

October 28th, 1895, defendant served upon plaintiff its notice of motion for leave to amend its original answer to plaintiff's original complaint, together with copy of the proposed amendment and copy of affidavit of Burke Corbet in support thereof; which proposed amendment, omitting the formal parts, was as follows:

Amendment to Answer.

Comes defendant and, with leave of court first granted, amends its answer to plaintiff's original complaint by:

I.

Striking therefrom paragraph five (5) thereof and substituting in lieu of said paragraph the following:

Defendant denies that it owes or is indebted to the plain-
11 tiff in any sum or amount whatever, and alleges that the aforesaid notes mentioned in said complaint were sold by plaintiff to defendant, and that defendant has fully complied with the terms of said sale and paid plaintiff the entire agreed price therefor by paying, applying, and appropriating the proceeds thereof strictly in accordance with plaintiff's offer, agreement, and direction.

II.

That by the allegations so stricken out defendant intended to allege the facts as above amended, and believed and still believes that, properly construed together with defendant's general denial, including a denial of all acts or offers of agency and of any sale by defendant to a third person, said original paragraph reasonably imports the same facts alleged in the substituted paragraph.

III.

That at the time of answering plaintiff's original complaint defendant understood the real controversy between the parties to be, and in fact it then was, solely as to the price for which plaintiff offered to sell said notes, whether at a discount from the principal sum or face of the notes or from said face and interest added, and as to the right of defendant to apply and appropriate one hundred and two and $\frac{5}{100}$ ($102.52) dollars to the payment of certain taxes and expenses, and not at all as to the question of plaintiff's sale to

defendant, for and on account of which reason defendant failed to make the allegations as to the sale by plaintiff to defendant as specified as they should properly have been made, and drew said answer with a view to the controversy as to the amount and disposition of the agreed purchase price.

Dated at Grand Forks, North Dakota, October 26, 1895.

November 8, 1895, the court, upon a hearing thereon, made the following order, which, omitting the formal parts, is as follows:

Order Granting Leave to Amend Answer.

On this 8th day of November, at two (2) o'clock p. m., at chambers, in the court-house, in the city of Grand Forks, county of Grand Forks, State of North Dakota, this action coming on for hearing on motion of defendant for an order granting the defendant leave to amend its original answer, and it appearing to the court that due and legal notice had been given the plaintiff of such action and the time and place thereof, and Burke Corbet appearing as attorney for the defendant in support of said motion, and Phelps & Phelps, as attorneys of record for the plaintiff, appearing on behalf of plaintiff and resisting said motion, and after reading and filing the notice of motion, the proposed amendment, and the affidavit of Burke Corbet, and an inspection of the records in this case, and the affidavit of H. W. Phelps in behalf of plaintiff, and it appearing that such prior order would be in furtherance of justice:

Now, therefore, it is hereby ordered and adjudged that defendant have leave to amend his answer as appears in its proposed amendment, and said answer is hereby so amended; to all of which plaintiff objects, and to which order and ruling the plaintiff excepts, and the exception is allowed.

Dated this 8th day of November, A. D. 1895.

By the court:

CHARLES F. TEMPLETON, *Judge.*

O. and M. Book 2, page 439.

January 30, 1897, defendant filed with the clerk its additional exceptions to depositions, which, omitting the formal parts, were as follows:

Additional Exceptions to Depositions.

Comes the defendant before this case is called for trial and objects and excepts to the several questions, answers, and exhibits of the deposition of Alexander Anderson, which purports to have been taken May 29th, 1893, as follows:

VII.

Defendant objects to the introduction of Exhibit "A," the telegram of October 3, 1891, as irrelevant, immaterial, and incompetent, as variance from the telegram alleged, and no foundation

laid by accounting for the absence of the original, if any, de-
13 posited with the telegraph company at Grand Forks, or showing that the same was written or sent by defendant or by its authority or in any manner connected with defendant, and because plaintiff has pleaded no contract of agency as a fact to be proved by evidence, but has pleaded two specific telegrams constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3, 1891, by the defendant, and Exhibit "A" is not relevant, material, or competent to prove that fact.

VIII.

Defendant objects and excepts to the interrogatories 11, 12, 13, 14, 15, 16, 17, and 18, and each thereof, for the same reasons and on the same grounds as the objections to the introduction of Exhibit "A," and as insufficient to identify Exhibit "A" as the telegram of defendant or to connect defendant therewith.

IX.

Defendant objects and excepts to the introduction of Exhibit "E," the letter of September 14th, 1891, as irrelevant, immaterial, and incompetent, no foundation laid by proving the authority of the writer to bind defendant bank thereby, and especially the authority of the writer to make a contract on behalf of the defendant bank that it would assume the duties and responsibilities of plaintiff's agent for the sale of notes and mortgage to a third person, such authority not being included in the implied or customary powers of the cashier of a national bank, nor one which can be assumed from such official position only; also because plaintiff has pleaded no contract of agency to be proved by evidence, but has pleaded two specific telegrams, constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3rd, 1891, by defendant, and Exhibit "E" is not relevant or competent to prove that fact.

X.

Defendant objects and excepts to interrogatories 44, 45, 46, 47, 48, 49, and 50 and the answers thereto, and each of said interrogatories and answers, for the reasons and causes set out in the above objection to Exhibit "E."

And defendant objects to each of said interrogatories and
14 answers separately for the reasons set out, and moves the court to strike out separately each and every answer therein contained and each and every exhibit thereto attached or therein referred to.

Dated Grand Forks, North Dakota, January 30th, 1897.

BURKE CORBET,
Attorney for Defendant.

To the above objections and exceptions to depositions — argued and submitted, and on each and every ground and for each and every

reason overruled and denied; to each ruling of which defendant duly excepts, and exceptions are allowed, and the same and all thereof are hereby ordered brought upon and made a part of the record in this case.

Done in open court, before calling a jury, February 2nd, 1897.

C. J. FISK, *Judge.*

O. & M. Book 3, 212.

A jury being empannelled, the case was tried, and the proceedings had therein are set out in the settled statement of the case, which is as follows:

Statement of the Case.

This cause coming on regularly for trial at the adjourned December, 1896, term, holden on February 2nd and 3rd, 1897, before the Honorable Charles J. Fisk, judge, and a jury, Henry W. Phelps, of the firm of Phelps & Phelps, as counsel for plaintiff, and Burke Corbet for defendant, the following proceedings were had:

Plaintiff offered in evidence depositions of Anderson of May 29th, 1893. Defendant objected to the introduction of any evidence on behalf of plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action. Overruled. Exception.

Plaintiff read in evidence the deposition of Alexander Anderson, taken May 29, 1893, being the only deposition produced on the trial.

Defendant interposed oral objections to *such* interrogatory, except the first and second, when read, and to each exhibit when offered, separately and before reading such exhibit or answer to such interrogatory, as upon oral examination of the witness in open court, upon the ground that the same was irrelevant, incompetent, and immaterial; also specifying additional grounds of irrelevancy and incompetency as shown below, and each of such objections was at the time overruled for the reason, among others, that no objections nor exceptions to said deposition or any part thereof were made or filed at or previous to the first trial of this action, and no objections nor exceptions to the deposition were made or filed at or previous to the second trial of this action, except objections made to Exhibits A, B, and C thereof, and defendant then duly excepted to such rulings; which exceptions were allowed, and the following are specific instances of such interrogatories, objections, rulings, and exceptions relied upon by defendant:

IX.

The testimony of witness to the effect that he was the plaintiff, resided at Seattle, and on October 1, 1890, had been the owner of the 350 acres of land described in complaint. Interrogatory ten was then read.

Int. 10. State whether or not you were, on the 3rd day of October, 1891, the owner of said seven promissory notes described in the complaint in this action.

Ans. I was.

Int. 11. State whether or not on said date (Oct. 3, 1891) you received a message, purporting to have been sent to you by defendant, relating to said notes.

A. I did.

Int. 12. Who delivered it to you?

A. The telegraph messenger employed in the office of the Western Union Telegraph Company, at Seattle, Washington.

Int. 13. State whether or not you know the handwriting of the telegraph operator then in charge of that office.

A. I do.

Int. 14. State whether or not you now have the message that was then delivered to you.

A. I have.

Int. 15. If so, produce it and have it annexed to this deposition, marked Exhibit "A."

Plaintiff offered in evidence Exhibit "A," attached to said
16 deposition, which was as follows:

"Received at SEATTLE, WASH., *Oct.* 3, 1891.

Alex. Anderson, Seattle:

Did you receive our letter September 14th? Wire us your best offer so we can advise a party who said he would hold his money until we heard from you.

FIRST NATIONAL BANK."

Defendant objected to the introduction of Exhibit "A," the telegram of October 3, 1891, as irrelevant and incompetent, a variance from the telegram alleged, and no foundation laid by accounting for the absence of the original, if any, deposited with the telegraph company at Grand Forks, or showing that the same was written or sent by defendant or by its authority or in any manner connected with defendant, and because plaintiff has pleaded no contract of agency as a fact to be proved by evidence, but has pleaded two specific telegrams, constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3, 1891, by the defendant, and Exhibit "A" is not relevant, material, or competent to prove that fact; which objection was overruled by the court; to which ruling defendant duly excepted.

Int. 17. State, if you know, in whose handwriting this message was written.

A. It is written in the handwriting of a telegraph operator employed in the office of the W. U. Telegraph Co. at Seattle, Washington, at that time.

Int. 18. State whether or not you replied to this message; and, if so, when.

A. I did, on October 5th, 1891.

Int. 19. If so, in what manner did you reply to it?

A. I replied by telegra*ph* addressed to the defendant at Grand

Forks, North Dakota; delivered it to a telegraph operator in the office of the Western Union Telegraph Company at Seattle, Washington, to be sent to the defendant, charges prepaid.

Int. 20. State whether or not you have the original telegram which you have mentioned.

A. I have not.

17 Int. 21. State whether or not you made a copy of the same.

A. I did.

Int. 22. If so, state whether or not you have that copy.

A. I have.

Int. 23. If so, you may refresh your memory by referring to the same and give the contents thereof in this deposition.

A. The contents were as follows:

"SEATTLE, WASHINGTON, *Oct.* 5, 1891.

First national bank, Grand Forks, N. Dak.:

Will give discount of five hundred dollars.

ALEX. ANDERSON."

Int. 24. Have this copy annexed to this deposition, marked Exhibit "B."

Copy offered and read in evidence; to which defendant objected on the grounds that it is irrelevant, incompetent, no foundation laid. Overruled. Exception.

Int. 25. State whether or not this is the copy which you have mentioned, marked Exhibit "B" and attached to this deposition.

A. It is.

Int. 26. State whether or not you received a reply from the defendant to this telegram; and, if so, what it was—by letter or by telegram.

A. I did, by letter.

Int. 27. Where and how did you receive this letter?

A. At Seattle, Washington, in the usual course of the mail.

Int. 28. State whether or not you now have that letter.

A. I have.

Int. 29. If so, produce it and have it annexed to this deposition, marked Exhibit "C."

A. Witness produced letter, which was offered in evidence. This is the letter, dated October 7th, 1891, from defendant to plaintiff, set out in defendant's answer, and was read in evidence.

Int. 31. What, if anything, was enclosed in this letter when you received it?

18 A. A New York draft for $4,397.48, payable to myself; also my note to the defendant for $2,000, due December 14, 1891, with interest paid to its maturity, duly cancelled. This is the same note mentioned in paragraph four in the complaint in this action.

Int. 32. State whether or not you replied to this letter, and, if so, when.

A. I did, on October 13th, 1891.

Int. 33. If so, in what manner did you reply to it?

A. I replied by letter addressed to the defendant, Grand Forks, North Dakota; deposited it in the post-office at Seattle, Washington, in the usual course of mail, with postage prepaid.

Int. 34. State whether or not you now have that letter.

A. I have not.

Int. 35. State whether you made a copy of the same.

A. I did.

Int. 36. If so, state whether or not you now have that copy.

A. I have.

Int. 37. If so, you may refresh your memory by referring to the same and give its contents in this deposition.

A. Its contents were as follows:

"SEATTLE, WASHINGTON, *October 13th*, 1891.

First national bank, Grand Forks, North Dakota.

GENTLEMEN: Your letter with enclosed draft for $4,397 is to hand, which amount I cannot accept. I wired you I would give discount of $500, five hundred dollars, and you have made a discount of about $1,175. I did not agree to pay any other expenses. Those notes call for $7,000.00 and $630 interest. I shall expect balance of money by return mail.

Yours respectfully, ALEX. ANDERSON."

Int. 38. Have this copy annexed to this deposition, marked Exhibit "D."

A. In answer, Exhibit "D" attached to deposition and identified.

Int. 39. State whether or not this is the copy which you have mentioned, marked Exhibit "D" and attached to this deposition.

A. It is.

Int. 40. State whether or not you have received any further
19 payment or remittance of any nature from the defendant for the proceeds of the sale of those seven Wilson notes mentioned in the complaint.

A. I have not.

Int. 43. State whether or not any portion of the notes in question has ever been paid to you by the signers of the same or in any other manner than by the remittance of the defendant which you have mentioned.

A. It has not.

Int. 44. State whether or not you have the letter of September 14th mentioned in Exhibit "A."

A. I have.

Int. 45. If so, where and how did you receive this letter?

A. At Seattle, Washington, in the usual course of the mail.

Int. 46. If so, produce it and have it annexed to this deposition, marked Exhibit "E."

This was afterwards marked Exhibit "11."

A. The letter produced.

Int. 47. State whether or not this is the letter you have just mentioned, marked Exhibit "E" and attached to this deposition.

A. It is.

Plaintiff here offers Exhibit "E," referred to, and which was as follows (this letter written on defendant's letter-head):

"GRAND FORKS, *September 14th*, 1891.

Mr. Alex. Anderson, Seattle, Wash.

DEAR SIR: We never make a trade in the way you mention—that is, pay a part and later on send or pay more. We, if we make a trade with any one, always close it up at once. Then it is complete and out of the way. If I had a basis to work on, I might find some one who would take the paper. You offered it at $350 ($370.00) discount. We offered you a trade at $1,000 discount. Now, if you will make it $700 or $800 and allow us a small commission, I will try and place the paper for you, you, as I wrote you, to make the title clear and straight if anything should come up in the deal. The paper could be sold easier if it all run not to exceed five years. Capitalists kick on anything over five years. Money is close and is going to continue. Wheat is going down every day; looks as though 65 or 70 cents will be the average price farmers will receive for this crop. If you care to have us go to work on these terms, you write or wire me.

Yours, S. S. TITUS, *Cr.*"

To which defendant objected on the ground that it was irrelevant, immaterial, and incompetent; no foundation laid by proving the authority of the writer to make a contract on behalf of the defendant bank that it would assume the duties and responsibilities of plaintiff's agent for the sale of notes and mortgage to a third person, such authority not being included in the implied or customary powers of the cashier of a national bank, nor one which can be assumed from such official position only; also for the reason that the plaintiff has pleaded no contract of agency to be proved by evidence, but has elected to plead two specific telegrams constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3rd, 1891, by defendant, and Exhibit "E" is not material, relevant, or competent to prove that fact; which objection was overruled by the court; to which ruling defendant duly excepted.

Int. 48. State, if you know, what paper is referred to in Exhibit "E."

A. The same seven promissory notes mentioned in the complaint in this action.

Int. 49. State whether or not at any time during this correspondence you had any paper payable to you or owned by you in the defendant's possession other than the seven promissory notes mentioned in the complaint in this action.

A. I did not.

Int. 50. State whether or not you replied to this last-mentioned letter.

A. I did not.

Int. 51. State, if you know, what notes are referred to in Exhibit "C" where the J. A. Willson seven notes are mentioned.

A. The same seven promissory notes mentioned in the complaint in this action.

Int. 52. State whether or not you know Mr. S. S. Titus, of Grand Forks, North Dakota?

A. I do.

21 Int. 53. If so, how long have you known him?

A. Ever since about 1883.

Int. 54. State, if you know, in what position he was acting during April, 1891, and from that time up to and including the month of October, 1891.

A. He was then acting as cashier in The First National Bank of Grand Forks, North Dakota, the defendant in this action.

Int. 55. State whether or not you know his handwriting?

A. I do.

Int. 56. If so, state whether or not the letters marked Exhibit "C" and Exhibit "E," which are here annexed to your deposition, are in his handwriting.

A. They are.

(It was stipulated by the parties that Roy L. Boulter, if sworn, would testify that he is and since June 18th, 1893, has been manager of the Western Union Telegraph Company at Grand Forks, North Dakota, and been in the telegraph business twelve years; that it has been since prior to 1891 and still is a rule of the company to burn all telegrams six months from sending or receipt; that witness has made diligent search at his office for a telegram dated October 3rd, 1891, purporting to be sent by First national bank to Alexander Anderson, at Seattle, and cannot find any such telegram, and that witness has no knowledge whether any such telegram was ever sent. Witness will also swear that October 3rd, 1891, there was no other telegraph company doing business in Grand Forks, North Dakota. It is further stipulated that such testimony is regarded as being given subject to the objections incompetent, irrelevant, and immaterial.)

S. S. TITUS, sworn and examined as a witness for plaintiff, this defendant in error, testified:

I reside in Grand Forks; was cashier of the defendant bank during and since October 7th, 1891; had some correspondence with plaintiff; think I had some about October 7th, 1891.

Q. Mr. Titus, you may state whether or not, as cashier of the First National Bank of Grand Forks, North Dakota, you had

22 any correspondence with Alexander Anderson, the plaintiff in this action, on or about the 7th of October, 1891, and prior thereto, leading up to the transaction with the plaintiff of the following-described notes: Seven promissory notes of the sum of one

thousand dollars each, signed by John A. Willson, Sarah J. Willson, Annie Warren, and Henry Warren, Sr., with annual interest, nine per cent., payable annually, up to December first, 1897.

A. I had some correspondence with Mr. Anderson; sent him some money in payment of his notes—those same notes. The bank became the owner of the notes prior to that time, at the time the loan was made, in the spring. (Witness produced a book and testified:) I have what is called the bills-receivable register. It is used by the defendant bank to keep a record of its notes, some of its property. There is where we enter up our bills receivable. There is a record there of seven notes for $1,000 each, signed by John A. Willson, Sarah J. Willson, Annie Warren, and Henry Warren, Sr., entered up in that book as of the date of October 7th, 1891; had possession of the notes prior to that date and before the loan.

Q. Please state how that paper came to be left with you in the first place.

A. It was first left with the bank as collateral security for a debt.

Q. How much was the debt?

A. Two thousand dollars.

Q. Whose debt was it?

A. Alexander Anderson's.

Witness continued: I did not see plaintiff personally in regard to the sale of the notes prior to October 7th, 1891. I had some correspondence with him. I think it commenced in August, 1891.

Witness was handed some letters and asked:

Q. Upon what date was the first item of correspondence?

A. August 11, 1891, appears to be the date of the first letter. Letter is marked Exhibit "3." I have seen this letter before; I presume four or five days after the date.

Q. Where did you receive that letter?

A. I received it at Grand Forks.

Q. You have already stated in the due course of the mails?

23 A. Yes.

Plaintiff offers in evidence Exhibit "3," being letter from Alexander Anderson, dated August 11, 1891, and over defendant's objection the letter was received and read in evidence to the jury and was as follows:

"SEATTLE, WASH., *Aug.* 11, 1891.

Mr. S. S. Titue, Grand Forks, N. D.

DEAR SIR: Any time you feel like buying those notes of mine, let me hear from you.

ALEX. ANDERSON."

Q. State whether or not you replied to that letter; and, if so, when?

A. I replied to the letter on the 17th of August, 1891.

Witness continued: I have not the original letter; I have letter-press copy.

S. S. TITUS being recalled, plaintiff offered in evidence Exhibit "4," which purported to be a letter-press copy of a letter dated August 17th, 1891.

Exhibit "4" is received in evidence and read to the jury.

"Alexander Anderson, Seattle, Washington:

Your favor of the 11th received. The offer to sell coming from you, you have neglected to say what you will take for the paper. I notice that it has a long time to run, the last note coming due in 1897. I presume the title is O K, but have not had it examined by our attorney. Money is very close here, and is liable to remain so all over the country for some time to come, certainly till after the next Presidential election, and even then, if the silver question is not settled, financial disturbances will continue. We may take the paper from you if it can be had at a discount that will warrant us in accepting it, but until we hear from you again we can give no definite answer. You will have to make a very liberal offer before we will take even time to go to the expense of looking it up.

S. S. TITUS, *Cashier.*"

Witness continued: I received a reply by letter dated August 27th, 1891.

Letter identified and marked Exhibit "7," which plaintiff offered in evidence.

24 Exhibit "7" was read in evidence and was as follows:

"SEATTLE, WASH., *August 27th*, 1891.

S. S. Titus, Grand Forks, N. D.

DEAR SIR: Your letter of the 17th is to hand regarding notes. I consider those notes worth face value, being well secured on as good land and as well located as anything you have in N. D., bearing good rate of interest, but think I can use the money to good advantage, and therefore would be satisfied to give a discount of five per cent. on face.

Very respectfully, ALEXANDER ANDERSON."

Witness continued: I replied by letter of September 3rd, and have not the original letter. I have a copy of it. The writing on the back of the letter, Exhibit "7," is a memorandum. It appears to be of date August 31st, 1891. It is neither a telegram or letter. It is in my handwriting. I don't know why I placed it there; I presume it is a copy of come of this correspondence—letters. I have not the original; I can't say whether I had the original when I made this memorandum; I don't remember; defendant's signature is not appended to it. It is my handwriting where it says "1st nat. bank," but it is not the signature. The words wired him, in pencil, above the memorandum in ink, is in my handwriting.

Memorandum marked Exhibit "8" is offered in evidence by plaintiff.

Exhibit "8" is received in evidence and read to the jury:

"Wired him." If accepted now, a party is here, so we can send you $4,000.00, together with your note, you to make the title good if anything comes up. Answer by wire at once.
Aug. 31, '91.

1ST NAT. BK.

Witness continued: I have before me a letter book, open at date September 3rd, 1891. I have not the original letter.

S. S. TITUS, recalled on behalf of plaintiff:

Plaintiff offers in evidence letter-press copy, Exhibit "9," of letter dated September third, 1891. Letter received and read in evidence, and was as follows:

GRAND FORKS, N. D., *Sept.* 3, 1891.

Alexander Anderson, Seattle, Wash.:

August 31 we wired you. If accepted now, a party is here, so we can send you $4,000, together with your note, you to make title good if anything comes up. Answer by wire at once. We overlooked confirming the same the same day. As yet we have received no reply, and come to the conclusion that you do not wish to sell the paper.

Money is very close here now and is going to be all over the Northwest, no matter how large the crop is.

S. S. TITUS, *Cashier.*

Witness continues: I received a letter in reply, dated September 8, 1891.

Produced and marked Exhibit "10."

Plaintiff offers letter marked Exhibit "10" in evidence, being letter from plaintiff to defendant's cashier, dated September 8th, 1891.

Exhibit "10" is received and read to the jury:

SEATTLE, WASH., *Sept. 8th*, 1891.

S. S. Titus.

DEAR SIR: Yours of the 3rd inst. is at hand. I do not wish to sell notes for the figures you offer. If you send $4,000 and note, balance some other time, it is all O K. I wrote you saying I would give a discount of five per cent. on face of notes.

Very respectfully, ALEXANDER ANDERSON.

Witness continues: This letter was answered by letter September 14th, 1891.

Exhibit "E" of Anderson's deposition produced, identified, and marked Exhibit "11," and witness stated: That signature is mine.

Plaintiff offers Exhibit "11" in evidence.

Defendant renews its objections to the introduction of Exhibit "11," being the letter of September 14th, 1891, as incompetent, irrelevant, and immaterial; no foundation laid by proving the authority of the writer to bind the bank thereby, and especially the authority

of the writer to make a contract on behalf of the bank to assume the duties and responsibilities of plaintiff's agent for the sale of the mortgage and notes to a third person, such authority not being the customary powers of a national bank or one that can be assumed by one of its officers, and also that the plaintiff has plead no contract of agency, and the fact in issue is the sending of the
26 telegram of October third, 1891, by the defendant; and Exhibit "11" is not material, relevant or competent to prove that fact; which objection is overruled by the court; to which ruling the defendant, by its counsel, duly excepts.

Exhibit "11" read in evidence and was as follows:

This is the same set out as Exhibit "E" to the deposition.

(A paper purporting to be a telegram received at Grand Forks, North Dakota, dated Seattle, Washington, October 5th, 1891, directed to First national bank, Grand Forks, N. D., saying, "Will give discount of five hundred dollars," signed Alexander Anderson, having certain pencil memoranda on back as follows: "Copy. Oct. 3, '91. Did you receive our letter Sept. 14? Wire us your best offer, so we can advise a party who said he would hold his money till we hear from you. 1st Nat. Bank;" and the back of the telegram was marked "Ex. 12," the face of the telegram being subsequently marked "Ex. 13.")

The witness' attention was called to the pencil memoranda by counsel for plaintiff, who asked: "What was the next item of your correspondence with the plaintiff?" and witness continued: October 7th, 1891, is the only record I have.

Q. You may state whether or not, Mr. Titus, on the first trial of this action, in the month of June, 1893,—state whether or not you did not make a different answer than the one you have just given to my question as follows: "What was the next correspondence that passed between yourself and the plaintiff in this case?"

A. I would have to refer to the record to see.

Q. Now that you have looked at the transcript, state whether or not you did make a different answer on the first trial of this case to that question.

A. I don't know that I did.

Q. You may state whether or not you telegraphed to the plaintiff in regard to the same notes on or about the third of October, 1891.

A. I have no recollection of telegraphing him.

Q. State whether or not you did have a recollection of telegraphing him on or about the third of October; 1891, when you first testified as a witness in this case on the first trial in June,
27 1893.

And the witness continued: I have no recollection of sending him a telegram on the third of October, 1891.

Q. Did you not testify on the first trial of this action as follows, "I wired him, asking if he had received our letter of September 14th, the last letter we wrote," in answer to the following question:

"What was the next correspondence that passed between yourself and the plaintiff in this case?"

(Counsel for plaintiff: The question is not for the purpose of impeaching or laying any foundation for impeachment, but for the purpose of refreshing the recollection of the witness.)

A. My recollection is that my testimony at the former trial was——

Defendant objects to the answer, as the question can be answered by yes or no.

By the COURT: The witness may answer yes or no.

Q. Do you remember, Mr. Titus?

A. There is a little more testimony there, and I cannot answer it without reading it all over. My answer will be—I referred to that telegram as a memorandum, I think, at the former trial, simply going by the record I had of having wired him—this memorandum slip here, "Ex. 12," of date October 3rd, 1891—and in giving my testimony, as I remember it, at the former trials, to keep this correspondence up I had copied this from something—I don't know where now. I had made a copy of that from some place to keep the chain of correspondence up.

Q. When you had that exhibit before you at the former trial, which was at one time marked "Ex. G," with the initial letter "F" signed, state whether or not the telegram was read in evidence.

A. Possibly a copy of the alleged telegram was read; I don't remember.

Q. Did you not on the first trial of this case, in response to the following question, "To that letter of September 14th, did you receive a reply, Mr. Titus?" did you not answer as follows: "I don't think we received any reply by mail."

A. Possibly I did.

28 A. Possibly I testified on former trials.

Q. To the effect the same as the answer is there?

A. Whatever that is.

Q. Mr. Titus, after this "Ex. 12," just referred to and which was then "Ex. G," was offered in evidence, did you not testify in response to the following question, "To that telegram did you receive a reply?"—did you not answer as follows: "I did"? Q. On the first trial of this case?

A. Possibly I did.

Q. You may state whether or not, on or about the 3rd of October, 1891, to the best of your recollection and belief, you sent the telegram to the plaintiff, of which Exhibit "12" appears to be a copy, which you have mentioned.

A. I have no recollection of sending such a telegram.

Q. State whether or not you sent the plaintiff, Mr. Alexander Anderson, any telegram on or about the third of October, 1891, to the best of your knowledge and belief.

A. I have no recollection of having sent Mr. Anderson any telegram on or about the third of October, 1891.

Q. State whether or not, on or about the fifth of October, 1891, you received any telegram from the plaintiff, Alexander Anderson.

A. All I have got to go by is this. I presume this came to Grand Forks about that time.

(Telegram is marked Ex. 13.)

29 Q. When you have just testified in regard to this telegram of the fifth of October, 1891, do you mean "Ex. 13"?

A. Yes; I presume so. That does not refer to any memorandum on the back of it.

Q. State whether or not, Mr. Titus, that is a memorandum in your handwriting on this "Ex. 13."

A. There is.

Q. Made by yourself?

A. It was.

Q. And this "Ex. 13" has been in your possession at some previous time to the time you made that memorandum?

A. Yes, sir; I have seen this before.

Q. Is it part of the same correspondence you had with the plaintiff in regard to these notes?

A. It has been in court here three or four years. I have seen it two or three times, I presume. I don't know whether that is the original one that I received or not.

Plaintiff offers in evidence "Ex. 12," being the memorandum of copy which the witness says, in substance, has been referred to on this trial before, and also offers "Ex. 13."

"Ex. 12 and 13" received in evidence.

Q. Mr. Titus, after this telegram of October 5th, 1891, just introduced in evidence, what was the next item in general of the correspondence referred to?

A. Well, as I said, my records show that after the letter of September 14th——

Q. I ask of October 5th.

A. The next after September 14th, the next letter, the next record I have is October 7th, 1891.

Q. Will you examine this original letter; is this your signature?

A. Yes; it is.

Letter is marked "Ex. 14" for identification, attached to deposition.

Q. The letter you have referred to is the one dated October 7th, 1891, marked Ex. "14"?

A. Yes, sir.

30 Q. You have already stated that that is your signature to that letter?

A. I did.

Q. That is "Ex. C" in the deposition of Alexander Anderson?

A. I don't know what number it is.

Q. Will you examine it?

A. I presume it is.

Q. At any rate, it is the letter in the deposition of Alexander Anderson dated October 7th, 1891?

A. I presume so.

Plaintiff offers in evidence "Ex. 14." "Ex. 14" is received as part of Mr. Titus' examination.

Q. Mr. Titus, when that letter was—you have testified to your signature; did you send that letter to Mr. Anderson, the plaintiff?

A. I presume so.

Q. What, if anything, did you send with it?

A. I sent a draft.

Q. For how much?

A. Just what the letter calls for.

Q. What else, if anything, besides the draft was sent with that letter of October 7th?

A. Whatever the letter says.

Q. You can refresh your memory from it.

A. It don't say. It says your note for two thousand dollars——

Q. That is, Mr. Anderson's note?

A. I guess so.

Q. This two thousand dollars referred to is the note — referred to when first called as a witness on this trial?

A. Yes, sir.

Q. The two thousand dollars that Mr. Anderson borrowed from you?

A. Yes.

Q. What is it you say in this letter returns for J. A. Willson seven notes—are those the same notes mentioned in the complaint?

A. I presume so.

Q. You have said that the defendant is the owner of those notes?

Defendant objects, and the question is withdrawn.

Q. Mr. Titus, from whom did you purchase those notes?

Defendant objects to this question upon the ground that it is incompetent, irrelevant, and immaterial, calling for the con-
31 clusion of the witness; which objection is overruled by the court.

Question by Mr. PHELPS: "From whom did you purchase these notes, Mr. Titus—the person?"

A. Alexander Anderson.

Witness shown assignment of notes and mortgage, which was identified by the witness, who stated he received it in April, 1891, about the time of the loan of $2,000. Assignment marked "Ex. 16" and received and read in evidence. (This assignment is dated the 6th day of Ap'l, A. D. 1891, signed by Alexander Anderson, running to the First National Bank of Grand Forks, N. Dak., and described the mortgage mentioned in the complaint, "together with the notes which said mortgage secures.")

Q. You have seen this mortgage before?
A. I have.
Q. Is the defendant the owner of this mortgage?
A. It is the present owner of it; yes.

Mortgage is marked "Ex. 17" for identification and is offered in evidence. "Ex. 17" is received in evidence and is the same mortgage mentioned in paragraph "III" of the complaint.

Q. When you stated yesterday forenoon that the defendant had owned the notes in suit some time prior to October 7th, 1891, what did you refer to?
A. I referred to the notes.
Q. State whether or not you had any reference to this assignment marked "Ex. 16."
A. That accompanies the notes and mortgage.
Q. My question is this: Whether you had reference to that yesterday forenoon when you stated that the bank had owned the notes for some time prior to Oct. 7th, 1891?
A. I don't know whether I had the assignment of the mortgage in mind at that time or not; that is a part of the seven-thousand deal; that assignment, together with the mortgage and notes, constituted the papers in the deal.

(Letter is marked "Ex. 18.")

Q. Have you seen this letter before?
A. Yes; I wrote it and signed it.

32 Plaintiff offers in evidence "Ex. 18," and the same is received in evidence, being letter as follows:

"GRAND FORKS, N. D., *April 6th*, 1891.

Alexander Anderson, Seattle, Washington:

Inclosed find the notes, seven, $1,000 each, for your endorsement; also an assignment of the mortgage for you to execute. This paper was sent us by Mr. E. C. Bates. We wrote him we would make you a loan of $2,000 with this as collateral, eight months, twelve per cent. discount. Sign inclosed note to this bank, $2,000. On receipt of the notes, having your signature on the back of each, the assignment properly executed and your signature to the $2,000 note, we will send a draft for proceeds.

Yours, S. S. TITUS, *Cashier*."

Q. Mr. Titus, you may state whether or not this correspondence commencing in August, 1891, and ending October 7th, 1891, is all the correspondence had between you and the plaintiff or between the defendant bank and the plaintiff in regard to the seven promissory notes in suit?
A. It is all I have any record of.
Q. Do you know the signature of Mr. Alexander Anderson to this assignment, "Ex. 16"?
A. I think it is Mr. Anderson's signature.

(Notes marked "Ex. 19" and "Ex. 20.")

Q. Are these notes marked "Ex. 19" and "Ex. 20," respectively, two of the seven thousand dollars of promissory notes that we have mentioned?

A. They are.

Q. "Ex. 19" and "Ex. 20" offered and received in evidence without objection, and are the last two notes of the series of seven notes described in the complaint, due, respectively, December 1st, 1896, and December 1st, 1897, both endorsed "Alexander Anderson," and with interest payments endorsed each year, the last endorsement being: "Int. paid to Dec. 1st, 1896." The notes are payable to the order of the plaintiff, and the interest payable annually at the rate of nine per cent. per annum until fully paid.

Q. Has the defendant any of those notes except these two?

A. No, sir.

33 Q. What has become of the others?

A. They have been paid.

Q. Were the other notes of the series besides these two of the same general tenor, one being due one year earlier each time?

A. I presume so; the mortgage describes them.

"Ex. 21" is here offered and introduced in evidence, being plaintiff's letter of October 13th, 1891, appearing in paragraph "VIII" of the defendant's answer, stating that he cannot accept defendant's remittance, and that he shall expect balance of money by return mail, etc., and witness testified that he received it at Grand Forks in the due course of mails.

Cross-examination of S. S. TITUS by defendant, this plaintiff in error:

I do not remember seeing Mr. Anderson until after October 7th, 1891.

Q. You spoke about having met him lately; when did you meet him?

Plaintiff objects to this question upon the ground that it is incompetent, irrelevant, and immaterial, having nothing to do with the matter in controversy, not the best evidence, no foundation laid, and not part of the *res gestæ*.

Counsel for defendant stated that Mr. Titus went to see Mr. Anderson.

Plaintiff objects and stated that if he has any offer to make that it be made in writing.

COUNSEL FOR DEFENDANT: We expect to prove admissions on the part of Mr. Anderson since the last trial, some time in December, 1895.

Plaintiff objects as to any admissions made after the fall of 1891; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness, S. S. Titus, that during the latter part of December, 1895, S. S. Titus saw the plaintiff personally and had a conversation with the plaintiff Anderson at

Seattle, Washington, in relation to the notes and the transaction in controversy, and that in said conversation the plaintiff admitted to said S. S. Titus that the plaintiff never considered the defendant as his agent; that he denied the agency and refused to allow
34 thirty-five dollars commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner.

The plaintiff objects to this offer on the ground that it is incompetent, irrelevant, and immaterial, not the best evidence, no foundation laid, and calling for the parol evidence tending to contradict the terms of a written contract of agency entered into between plaintiff and defendant by means of letters and telegrams already introduced in evidence; calling for the conclusions of the witness and improper cross-examination; which said offer is rejected by the court; to which ruling the defendant, by its counsel, duly excepts.

I know Mr. Phelps, the attorney for the plaintiff in this action; have known him about ten years. He called to see me in relation to this transaction before the commencement of this action.

Q. Did you have a conversation with him in relation to this case and the transactions out of which this litigation arose?

Plaintiff objects to this question upon the ground that it is incompetent, irrelevant, and immaterial, unless it is shown that the conversation sought to be introduced occurred before this contract—the correspondence which constituted the contract—was completed, and is improper cross-examination; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Plaintiff rests.

The defendant now moves the court to strike out Exhibit "E" of the deposition of Alexander Anderson, also identified as Exhibit "11" in this case, as incompetent, irrelevant, and immaterial; not shown to have been the act of the defendant, but *ultra vires*; not tending to prove any of the issues in this case or any allegation; which motion is denied by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant's Case.

S. S. TITUS recalled by defendant:

Witness continued: I am acquainted with Mr. H. W. Phelps, the gentleman sitting there, attorney for plaintiff. I had a con-
35 versation with him prior to the commencement of this action in reference to these notes at the First national bank. He was in two or three times to see about the paper; he made demand on me for the money in connection with this same matter.

Q. In the course of that conversation was anything said by you and Mr. Phelps as to who was the owner of the paper?

Plaintiff objects, as a declaration in the defendant's own interest and not tending to prove any demand by the plaintiff.

COUNSEL FOR DEFENDANT: We offer this for the purpose of showing the plaintiff, through its counsel, Mr. Phelps, had knowledge at the time the action was brought, and knew that the defendant owned the paper and claimed to own it.

The objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant's counsel offers to prove by this witness that he had a conversation with the plaintiff's attorney, Mr. Phelps, at the time when this subject was under discussion between them, and that said attorney was at the time acting for and on behalf of the plaintiff in the action; that the witness stated to him that the bank was the owner of the paper, the subject-matter in dispute.

Plaintiff objects to the offer on the grounds before stated. The offer is rejected by the court; to which ruling the defendant, by its counsel, duly excepts.

Exhibit "25," a letter, as follows:

MINTO, NORTH DAKOTA, *Dec.* 1*st*, 1892.

S. S. Titus, cashier, Grand Forks, N. D.

DEAR SIR: Enclosed find my check for ten hundred fifteen dollars ($1,015.00), same to pay your note No. 17947, given by John A. Willson and wife and Warren to Anderson, now held by you.

Willson claims he paid you interest last year to December 1st, 1891, on all the notes, and this year to December 1st, 1892.

If he is correct, I am sending you $15.00 too much. Send the note to me.

Yours truly, J. D. PHELPS.

36 was identified by H. W. Phelps as being in the handwriting of J. D. Phelps, and H. W. Phelps further testified that the firm of Phelps & Phelps, plaintiff's attorneys, was composed of H. W. Phelps and J. D. Phelps.

Witness Titus resumed: Exhibit "25" was received by defendant bank in due course of business.

Defendant offers Exhibit "25" in evidence; to the introduction of which the plaintiff objects upon the ground that it is incompetent, irrelevant, and immaterial, as it appears that the writer was acting in behalf of John A. Willson and not acting in behalf of the plaintiff, Alexander Anderson, in the subject-matter; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Q. Mr. Titus, I believe you have stated that since the last trial you met Mr. Anderson at Seattle, Washington. Is that correct?

A. Yes; I met him.

Q. Did you have any conversation with him at that time upon the subject-matter in litigation?

Plaintiff objects to this question upon the ground that it is in

competent, irrelevant, and immaterial, tending to introduce paro evidence to vary the terms of a written contract; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness that he personally saw plaintiff Anderson at Seattle, Washington, in December, 1895, after the last trial, and that plaintiff then admitted to witness that he had never considered either Titus or the bank as his agent; that he had always denied such agency, and refused to allow $35.00 commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner.

Plaintiff objects to this offer on the ground that it is incompetent, irrelevant, and immaterial, not the best evidence, no foundation laid, and calling for parol evidence tending to contradict the terms of a written contract of agency entered into between plaintiff and defendant by means of letters and telegrams already introduced in evidence, calling for the conclusion of the witness; which
37 objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Q. Mr. Titus, was the defendant bank ever the agent of the plaintiff for the sale of the notes in litigation?

Plaintiff objects to this question upon the ground that it is calling for the conclusion of the witness, not the best evidence, calling for parol testimony to vary the terms of a written contract; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

The witness was then asked successively each of the following questions; to each of which plaintiff objected on the same ground as last above, and each objection was sustained by the court; to each of which rulings the defendant duly excepts and now assigns as error:

Q. Did the defendant bank ever attempt to act as agent for Mr. Alexander Anderson, the plaintiff in this action, or sell or offer to sell, as agent of Mr. Alexander Anderson, the notes described in the plaintiff's complaint to itself?

Q. Did you yourself ever undertake to act as agent for Alexander Anderson for the sale of notes in litigation to the bank?

Q. Did the defendant, from the correspondence and letters or telegrams that passed between the plaintiff and the defendant bank in this action and all communications, believe that they were buying the paper directly from the plaintiff in this action, and that the plaintiff was selling the same directly to the defendant?

Q. That all communications from the plaintiff to the defendant were understood and believed by the defendant to be so intended by the plaintiff?

Q. Mr. Titus, did you believe from the telegrams sent by the plaintiff to the bank October 5th, 1891, that the plaintiff intended to sell said notes to the bank for $6,500.00, less $2,000.00 notes held by the bank and the expenses of clearing the title to the land?

Q. Did the defendant bank understand from the the telegram of October 5th, 1891, that it was the intention and understanding of the plaintiff to sell the seven promissory notes mentioned in the complaint to the defendant for $6,500.00, less the plaintiff's notes of $2,000.00 to the bank?

38 Q. Did the plaintiff ever return or offer to return to the defendant bank his own note of the $2,000.00 or the draft that was transmitted, for something over four thousand dollars, to him?

Plaintiff in this action objects to this question upon the ground that it is incompetent, irrelevant, and immaterial; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant now offers to prove by this witness all facts set out in paragraph eleven of its answer to the amended complaint; to which offer the plaintiff objects upon the ground that it is calling for a conclusion of law, not the best evidence, and calling for parol testimony to vary the terms of a written contract between the plaintiff and defendant; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Witness continued: I know R. M. Sherman; knew him about October, 1891. He was acting secretary of the Vermont Loan & Trust Company, doing business at Grand Forks and Spokane Falls, Washington. He then resided at Spokane Falls, Washington, and was visiting Grand Forks at that time. Prior to that time I made the deal with Anderson for this paper. August 31st, 1891, R. M. Sherman proposed to buy the seven notes in controversy from the bank if the bank could procure Anderson's interest therein, and that he was the person that the witness Titus referred to when he wrote the telegram of August 31st, 1891: "If accepted now, a party is here, so we can send $4,000, together with your note, you to make the title good if anything comes up; answer by wire at once."

Defendant now offers to prove by this witness that upon the idea of selling these notes by the bank to R. M. Sherman they had the correspondence with the plaintiff and all the correspondence that was had with the plaintiff with the view not to act as agent for the plaintiff, but to purchase the plaintiff's residuary interest in the notes and then sell the entire notes to Mr. Sherman.

The plaintiff objects to the offer upon the ground that it is incompetent, irrelevant, and immaterial, calling for parol evidence to vary the terms of a written contract, and not the best

39 evidence, and calling for a conclusion of the witness; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Q. Mr. Titus, did you fail to sell the paper to Mr. Sherman?

A. I did.

Q. What was the trouble between you and Mr. Sherman as to why you failed to sell it to him?

Plaintiff objects to that question upon the ground that it is im-

material; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness that R. M. Sherman insisted that the bank should guarantee the payment of the notes, and the bank declined to guarantee the payment of the notes absolutely, and for that reason the notes were thrown back upon the bank and they were held by them ever afterwards.

Plaintiff objects to the offer as immaterial; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

J. WALKER SMITH testified: I am and was during the whole year 1891 president and a director of The First National Bank of Grand Forks, North Dakota, the defendant, and as such president and director presided at each and every meeting of the board of directors of the defendant bank held that year. I have in my possession and have examined the minutes of the various meetings of that board for that year.

Q. I would ask you, Mr. Smith, if the board of directors of The First National Bank of Grand Forks, North Dakota, the defendant, in any way ever authorized Mr. Titus to act for and in behalf of the bank, constituting the bank thereby the agent of Alexander Anderson, the plaintiff in this action, for the sale of the notes in litigation.

Plaintiff objects to this question upon the ground that it is incompetent, irrelevant, and immaterial; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

The defendant offers to prove by this witness that the defendant bank did not in any way, either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the bank, constituting the bank the agent of Alexander Anderson, the plaintiff in this action, for the sale of the seven promissory notes in litigation in this action.

The plaintiff objects to this offer upon the ground that it is incompetent, irrelevant, and immaterial, and the defendant is estopped from questioning the agency of the defendant in acting for the plaintiff; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

The defendant also offers to prove by this witness that the board of directors never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, as the agent of Alexander Anderson for the sale of the paper in litigation, the seven promissory notes.

To this offer the plaintiff objects upon the grounds same as last above; same ruling and exception by the defendant.

JOHN BIRKHOLZ, called as a witness on behalf of defendant, testified:

I reside and have for fourteen years past *have* resided at Grand Forks, North Dakota, and have there been engaged all that time in

the business of lending money, and am familiar with the character of land in different townships in Grand Forks county, and of lands in the township in which the lands mortgaged to secure the seven notes is situated, and know the value of the N. E. 5–154–53; examined the mortgage securing these seven notes; am familiar with the values of instruments of that kind.

Q. I would ask if you know what the value of that mortgage and the paper secured thereby was in the market at Grand Forks, North Dakota, in August, 1891.

Plaintiff objects to this question as incompetent, irrelevant, and immaterial, calling for the conclusion of law, and not the proper method of proving the value of chose in action under the decisions of the territorial supreme court; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness that he was examined as a witness on behalf of the defendant at the former trial of this case in relation to these notes and mortgage, and became familiar with the notes and mortgage and the securities and is familiar with them, and that he knows their value and knows their actual
41 value, and what the value of the notes was on October 7th, 1891, and knows their value on that day and all times since, and that it was not to exceed the sum of $6,000.00.

To which offer the plaintiff objects upon the ground that it is incompetent, irrelevant, and immaterial, and calling for a conclusion of law and not the proper method of proving the value of choses in action; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove same facts by witnesses Fulton, Clifford, and Lander, then in the court-room; same objection and ruling and exception.

Defendant rests.

The defendant renews the motions made at the close of the plaintiff's case and in the same form, and the same objections are interposed by the plaintiff; same ruling by the court; to which ruling the defendant, by its counsel, duly excepts.

The plaintiff now moves the court to direct a verdict for the plaintiff for the sum of $1,705.85, being the difference between the *prima facie* value of the notes and defendant's remittance of $6,397.48, made by the defendant to plaintiff October 7th, 1891, by way of draft, and the plaintiff's own $2,000.00 note, being the balance of $1,243.02, with interest from October 7th, 1891, at the rate of seven per cent. per annum, up to the present time, on the ground that the defendant in this action was the plaintiff's agent for the sale of the seven notes mentioned in the complaint to a third party on October 7th, 1891, and that, as alleged in the complaint, the defendant sold these notes to itself, and thus converted the notes to its own use, and has remitted to the plaintiff, out of the total value, only the sum of $6,397.48, leaving a balance of $1,243.02, with interest due plaintiff thereon from the 7th day of October, 1891, to the present time.

The defendant now moves the court to submit to the jury the question whether or not the defendant bank ever entered into a contract with the plaintiff, whereby it undertook and engaged to act as the agent of the plaintiff for the sale of these notes, or as
42 agent for the plaintiff in any manner, in connection with these notes; which motion is denied by the court.

Motion of the plaintiff before stated for a direction of a verdict for plaintiff is granted by the court; to which ruling the defendant, by its counsel, duly excepts.

Pursuant to which decision the jury returned the following verdict:

"We, the jury in the above-entitled action, find for the plaintiff and against the defendant, and assess plaintiff's damages at the sum of $1,705.85, seventeen hundred five and $\frac{85}{100}$ dollars.

Dated February 3rd, A. D. 1897."

Specifications of Error on Motion for New Trial in District Court of North Dakota, Anderson vs. Bank.

Defendant specifies as errors upon which it relied in the further proceedings in the above-entitled case each of the several rulings of the court set out in the foregoing portion of this statement of the case to which exceptions were taken by the defendant and entered and which for the sake of brevity are not included here, but now specified respect*fully* as errors 1 to 141, inclusive.

Defendant further specifies as errors upon which it relies the following rulings of the court:

144.

The court erred in overruling, on February 2nd, 1897, the defendant's written exceptions, dated January 30th, 1897, to specific interrogatories, answers, and exhibits of said deposition; all of which were made a part of the record February 2nd, 1897.

145.

The court erred in admitting Exhibit "A," the paper received by plaintiff at Seattle, written by the telegraph operator there, and purporting to be the receiver's copy of a telegram dated October 3rd, 1891, signed First national bank, for the reasons set out in the written exceptions to the deposition and to this specific ex-
43 hibit and the oral objections interposed when offered on trial, shown as assignment of error No. 22, and because of variance from the telegram alleged, not connected with defendant, no evidence of the identity or authority of the writer or sender, if any; does not tend to prove the sending of the alleged telegram, and the agency, if established, would be *ultra vires* and the act of any officer contracting that the bank would act as agent would be *ultra vires.*

147.

The court erred in admitting Exhibit " E " attached to the deposition, being the letter of September 14th, 1891, for the reasons set out in defendant's written exception to the deposition and this specific letter and in the oral objections to it when offered on the trial, as set out on page — of this statement.

151.

The court erred in excluding testimony of S. S. Titus to admissions and statements made by plaintiff at Seattle in December, 1895, that he did not consider defendant his agent for the sale by defendant as agent, but a direct purchase and sale from plaintiff to defendant, and the further evidence of Titus as to the understanding he had of the transactions, and the construction which the parties to the transaction had themselves placed upon the correspondence, and upon which both acted in the transaction as one of direct sale and not of agency, because the construction which was placed by the parties themselves upon the letters and upon which they acted in the transaction determines whether there was a wrongful conversion of the notes, this being an executed contract and not an executory one, and the defendant not seeking the enforcement of the terms of the contract, but seeking to recover for an alleged violation of the contract by an act done with his knowledge and consent, and according to the terms of a contract as understood and intended by himself.

152.

The court erred in excluding the evidence of Birkholz, Fulton, Lander, and Clifford as to the value of the notes, because in this case, on a contract involving the value of notes having from
44 one to six years to run and having a definite and well-established marked value, and which could be replaced by equivalent paper for a known price, there was no conclusive presumption that the paper was worth the face and accrued interest.

154.

The court erred in excluding the testimony of J. Walker Smith, that no authority was conferred upon any officer to nor was any steps taken whereby the defendant bank could engage to act as agent for the sale of these notes or otherwise, because any contract to that effect is *ultra vires* and not within the implied or customary powers of officers of a national bank.

Dated this 19th day of March, 1897.

BURKE CORBET,
Attorney for Defendant.

Order Refusing New Trial.

On this 12th day of May, 1897, this cause coming on regularly for hearing, upon the motion of defendant to vacate and set aside the verdict of the jury returned upon the trial of said cause at the

adjourned December, 1896, term of said court, holden at the said county February 2nd, 1897, and subsequent days, and to order a new trial of said action—

It appeared to the court that due and proper notice of intention to move for a new trial had been by defendant duly served upon plaintiff; that a full, complete, and proper statement of the case had been, upon due notice and proper proceedings, duly settled by the court and filed, and that due notice of the hearing of the above notice had been served by defendant upon plaintiff, plaintiff expressly and in writing having waived time, and all other further notice of said motion, and consented to the hearing and determination of said motion forthwith, and the parties accordingly appeared, the plaintiff by Phelps & Phelps, his attorneys, and the defendant by Burke Corbet, its attorney, and submitted the motion upon the record and the statement of the case aforesaid, and the court, being duly advised, finds that said motion for a new trial should be denied.

45 It is therefore hereby ordered that said motion be, and the same is, overruled and denied.

Dated May 14, 1897.

By the court:

C. J. FISK,
Judge of the District Court.

And June 3rd, 1897, judgment was rendered and entered in said case as follows:

Judgment on Trial.

This action having been regularly placed upon the calendar for trial at the December (1896) term of the district court, begun and holden at the court-house, in the city of Grand Forks, N. D., on the first day of December, A. D. 1896, and having been reached in its regular order for trial, plaintiff appearing by Phelps & Phelps, his attorneys, and defendant by Burke Corbet, its attorney, and a trial by a jury having been had on the 2nd and 3rd days of February, 1897, and the jury having, on the 3rd day of February, 1897, rendered a verdict in favor of the plaintiff and against the defendant for the sum of seventeen hundred and five and $\frac{85}{100}$ dollars ($1,705.85), and the court having ordered judgment in accordance with said verdict, and for the costs and disbursements herein, to be taxed by the clerk:

Now, therefore, on motion of Phelps & Phelps, attorneys for said plaintiff, it is adjudged and determined that said plaintiff do have and recover of the said First National Bank of Grand Forks, North Dakota, defendant, the said sum of seventeen hundred and five and $\frac{85}{100}$ dollars, and the sum of thirty-nine and $\frac{80}{100}$ dollars, interest on said verdict, together with the costs and disbursements of this action, taxed and allowed at the sum of one hundred and sixty-eight and $\frac{75}{100}$ dollars, making a total judgment of one thousand nine hundred fourteen and $\frac{40}{100}$ dollars ($1,914.70).

Witness the Hon. Charles J. Fisk, judge of said district court, and

my hand and the seal of said court, this 3rd day of June, A. D. 1897.

[District Court Seal.]

L. K. HASSELL, *Clerk.*

Date of appeal to the supreme court of North Dakota: July 17th, 1897.

46 *Assignments of Error on Appeal to the Supreme Court of North Dakota.*

I.

Under the amended rules of this court, the supreme court of North Dakota, Rule XII, appellant does not quote or duplicate its specifications of error as set out in the statement of the case, but appellant relies upon the same as assignments of error, and by reference herein makes such specifications and each thereof and the specifications of particulars wherein the evidence is insufficient to sustain the verdict and the order directing the verdict a part of this its assignment of errors.

II.

Appellant further says that there was manifest error in the order overruling appellant's motion for a new trial for the reasons set out in the specifications of errors, set out in the statement of the case, and for the reasons stated as grounds for appellant's several objections and motion on the trial, and for the exclusion and admission of evidence and insufficiency of evidence.

III.

Appellant further says there was manifest error in rendering judgment against appellant in this action for each of the foregoing reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the United States to national banks against liability on account of *ultra vires* acts of their officers and *ultra vires* contracts of the banks themselves.

Dated August 10th, 1897.

BURKE CORBET,
Attorney for Defendant.

In Supreme Court, State of North Dakota, September Term, 1897.

Alexander Anderson *vs.* First Nat. Bank of Grand Forks, 72 N. W. Rep., 916, '19, '20, & '21.

All objections to depositions, except for incompetency or irrelevancy, must be taken before the trial is commenced or they are forever waived.

47 "The construction of a written agreement is a question of law for the court, and therefore, ordinarily, it is incompetent

to prove what either party to a written contract considered its meaning or its legal effect."

"Questions decided on the former appeals in this case reaffirmed."

The promissory notes of individuals have no market value, and evidence of their market value is therefore incompetent. Witnesses are not permitted to testify generally as to the value of such paper, but must confine their evidence to facts which bear upon the question of value. The insolvency of the maker, the fact that the paper is not secured, or that the security is inadequate, the existence of a defense to the paper, and other facts of a like nature affecting the value of such paper may be proved; but mere opinions as to value are not competent. This is the rule, not only in actions for conversion of such paper, but also in actions in which the party injured waives the tort and sues in assumpsit for the value of such paper on the theory of a sale.

Prima facie a chose in action is worth what appears to be due upon it, and unless the presumption is rebutted by legal evidence, it is conclusive.

(*Syllabus by the Court.*)

CORLISS, *C. J.:*

This cause, having been tried four times in the district court, is before us a fourth time on appeal. On the last trial the trial court directed a verdict for plaintiff for the amount due upon the notes at the time of their conversion by defendant, less the sum that had beed paid by defendant to plaintiff by a remittance to plaintiff, on the theory that it was remitting the proceeds of a sale thereof by defendant as agent for plaintiff. In its main features the case is practically the same as on the last appeal. There is only a slight difference in the facts; none calling for any change of decision on the points already disposed of. The answer, as before, puts in issue the question of agency; but the undisputed facts conclusively establish such agency. It is true that the offer by plaintiff of one of the telegrams which had been repeatedly received in evidence on the former trials was strenuously objected to, and it is here
48 urged that such telegram was not proved by competent evidence. This is the telegram from defendant to plaintiff dated October 3d. We may strike this from the record, and yet there remains unanswerable proof of agency. Defendant's letter of September 14th contains an offer by defendant to act as agent for plaintiff in the sale of the notes in question. This letter embodies the following statement: "If I had a basis to work on, I might find some one who would take the paper. You offered it at a $350 discount. We offered you a trade at a $1,000 discount. Now, if you will make it $700 or $800 and allow us a small commission, I will try and place the paper for you." Defendant's letter to plaintiff of October 7th reports a sale of the notes by defendant as agent for plaintiff, the sale purporting to have been made by defendant in answer to a telegram from plaintiff to defendant offering to sell at a certain discount. This telegram was in answer to defendant's

proposition to sell the paper, as agent for plaintiff, for a small commission. In this letter of October 7th defendant charged plaintiff a commission of $35 for making the sale. In view of these uncontroverted facts, it becomes unnecessary for us to determine whether there was error in receiving in evidence the telegram of October 3d. Eliminating it from the case does not in the least affect the question of agency.

Some new questions are presented to us for consideration. Among them is the question of the admissibility of certain evidence offered by defendant to prove the value of the notes in question. This evidence was the opinion of experts. *Prima facie* the value of these notes, both at common law and under our statute, was the full amount due thereon at the time of the conversion thereof by defendant. Rev. Codes, sec. 5012; Comp. Laws, sec. 4615. Several witnesses were called by the defendant, and defendant offered to prove by their testimony what the value of such notes was, and that the value thereof did not exceed the sum of $6,000. This evidence, being objected to by plaintiff, was excluded, and it is here urged that in so doing the district court committed error. It is to be noted that no attempt was made to show the insolvency of the makers of these notes, or that there was any defense to them, or that any portion thereof had been paid. Indeed, it was established on the trial and does
49 not appear to be disputed that the land on which these notes were secured by a mortgage was of greater value than such notes. No evidence tending to show that the security was insufficient was offered by defendant, despite the fact that the witnesses who testified on its behalf swore that they knew the value of the land. The case before us therefore is the case of notes executed by solvent makers, amply secured, subject to no defense, and on which the full amount of principal was due, together with some accrued interest. These notes bear a good rate of interest, even for North Dakota, the rate being 9 per cent. To allow witnesses to conjecture about the future solvency of the parties, to speculate about the possible decline in the value of the security, and on such a basis express an opinion—a mere guess—as to the value of the paper, would be a dangerous doctrine. Paper of this character, unlike chattels and municipal, State, and national bonds and corporate stock, is not generally bought and sold in the market and cannot be said to have a market value. There may at times be local dealings in such securities of considerable magnitude, but we must establish the rule to apply to all communities in the State and under all circumstances. We do not think that the fact that there were at the time of the conversion of this paper a large amount of individual notes bought and sold in commercial circles in Grand Forks city furnishes any reason why we should establish a rule that such paper has a market value, when we well know that, taking the State at large and considering the general trend of business, there is a wide distinction between chattels and such securities as marketable property. The chief dealing in paper of this kind is at the banks and loaning institutions, where money is borrowed by debtors upon their notes, secured or unsecured. Such paper is not sold in open

market, as wheat or municipal securities or other like property. There is therefore no standard of value to apply to it, except that which each witness creates in his own mind, basing his opinion, perhaps, upon what he would give for the property, or on a conjecture as to the future solvency of the maker. In this particular case the foundation of the opinions of the experts as to the value of these notes would seem to be the risk of the future insolvency of the makers thereof. Defendant offered to prove by any one of its
50 witnesses "that the risks of the insolvency of the makers of negotiable instruments which are to become due in one, two, three, four, and five years is a material element in depreciating the value of the paper, notwithstanding the fact that the parties may be perfectly solvent at the time of making or at any particular time thereafter; that the risk of insolvency itself is an element which does actually depreciate the value of the paper." Had this witness been permitted to express his opinion as to the value of these notes, we know that it would have rested largely upon the remote possibility of the future insolvency of the makers, although as a matter of fact the notes were adequately secured and were therefore good without reference to the solvency of such makers. Extreme cases can be imagined where the rule which we follow in this case may work some slight measure of hardship, but in the great majority of instances—indeed, in practically every case—it is the only rule which will not result in placing the owner of choses in action at the mercy of every wrong-doer and the surmises and guesses of persons who really know nothing about the market value of such property, because as a rule it has no market value. Would-be wrong-doers can protect themselves against this rule, if they deem its operation harsh, by keeping their hands off the property of others. Persons who buy such property can protect themselves by an agreement as to the price to be paid. The cases fully support our decision on this point. In fact, no ruling to the contrary can be found. Holt *vs.* Van Eps, 1 Dak., 208; 46 N. W., 689; Booth *vs.* Powers, 56 N. Y., 22; Atkinson *vs.* Printing Co., 43 Hun., 167; Potter *vs.* Bank, 28 N. Y., 654. In Potter *vs.* Bank the court said: "It was insisted on the trial that the proper question to put to the witness, in order to arrive at the measure of damages, was, 'What was the value of the note?' And the ground on which the right to put the question is that such is the inquiry of all of the cases where the value of property is sought to be recovered. The general rule is that the value of property must be ascertained by answers to the direct questions as to its value, and the reason is that persons are examined who know its value and can speak from their own personal knowledge in relation thereto; but this rule cannot apply to choses in action that have no intrinsic
51 value, as a horse or an acre of land has. Their value depends on the pecuniary condition of the parties liable thereon, and hence, in such case, the direct and proper inquiry would be, 'Are the parties to the bill or note or other chose in action solvent and able to pay their debts?' But, as the law presumes that fact in favor of the plaintiff, it is not necessary that he prove it, and the burden is

therefore cast upon the defendant to disprove it." Nor do we think that there is any reason for applying a different rule to this case because of the fact that plaintiff has elected to waive the tort and sue in assumpsit, on the theory of an executed contract of sale complete in all its terms save with respect to the purchase price to be paid. It is the defendant's duty to pay the full value of these notes as much in this form of action as it would be in an action for conversion. The reason for the rule that in actions for conversion the market value cannot be proved is that, generally speaking, such property has no market value. This reason exists precisely the same in an action to recover the value of such property on the theory of a sale without an agreement as to the purchase price; nor was anything to the contrary decided in Barrington *v.* Bank, 14 Serg. & R., 405. The danger of permitting opinion evidence as to value in this class of cases is illustrated by the facts of this case. Here is paper of perfectly solvent makers, amply secured, bearing a large rate of interest, and the full amount due thereon at the time of the conversion by the defendant was $7,630, and yet defendant offered to prove by its experts that these notes were then worth only $6,000, and this, too, in the very teeth of the fact that five of the seven notes, together with the interest thereon, had been at that time fully paid to the defendant. It is hard enough for plaintiff to lose the difference between 9 and 7 per cent. interest (he being entitled to only 7 per cent. interest since the day of the conversion of the notes, although the defendant has collected, and will continue to collect, interest at the rate of 9 per cent.) without being required by law to throw away $1,630 on the bare conjecture of witnesses.

Certain objections were made to the deposition of plaintiff.
52 They came too late. That deposition was read without objection on the first and second trials of this case. After the first trial had been entered upon without any objections being made, all objections other than for incompetency or irrelevancy were waived. Comp. Laws, sec. 5299; Rev. Codes, sec. 5687. The evidence of the plaintiff contained in this deposition was objected to on the last trial on the ground that it was incompetent and irrelevant. Much of the testimony was clearly relevant, and all of it was competent except that which related to the value of the notes. If we should strike this testimony out of the case, we would still have left the statutory and common-law presumption that the notes were worth their face, and unless this was rebutted by legal evidence, or unless there was an offer of legal evidence to overthrow it, the trial court was justified on the basis of this presumption, unaided by plaintiff's testimony as to value, in directing a verdict for plaintiff for the face value of such notes. Some of the facts to which plaintiff testified were undisputed; others were admitted by defendant's cashier on the witness stand, and plaintiff's testimony as to value merely corroborated the presumption of the law that the notes were worth their face. If competent evidence as to value, tending to reduce their value below the amount due thereon, had been received or offered, the question must have been submitted to the jury, and the case would have to be reversed for error in refus-

ing so to do, without reference to the question whether plaintiff's evidence as to value was competent or not. If, on the other hand, defendant offered no legal evidence tending to overthrow the presumption of the law, then, without plaintiff's evidence as to value, the state of the evidence on that point called for the direction of a verdict in favor of the plaintiff for the full sum due upon the paper at the time of the conversion thereof. As we will demonstrate later, the court in effect struck out the plaintiff's testimony as to value, so that defendant's objection was in fact sustained. It is not practicable to discuss in detail all the objections made to the plaintiff's evidence in the deposition referred to. We will merely state our conclusion that no prejudicial error appears to have been committed by the court in overruling such objections.

53 It is urged that by the change of the issues resulting from plaintiff's amendment to his complaint after the deposition was taken defendant was deprived of its right to cross-examine the plaintiff, the importance of his evidence under the present issue not being in some respects manifest as the issues then stood; but defendant has not applied for an order to be allowed to cross-examine, or that in default thereof the deposition be suppressed. In the exceptions filed to the deposition defendant did not ask that the privilege of cross-examination be accorded it. It merely insisted that the whole deposition should be suppressed. This was the motion it made on the basis of its exceptions before the trial commenced. The whole deposition cannot be suppressed merely because by reason of some change in the issues a party ought to be permitted to cross-examine on some point or object to a portion of the evidence. Only one new question was brought into the case by the amendment to the complaint which would make it important to cross-examine the plaintiff on one point to which he testified. In the original complaint the question of agency was involved as the very basis of the action. The suit was to recover from the defendant the proceeds of a sale by it of the notes in question to a third person as agent for the plaintiff. The defendant admitted the agency and interposed the defense that it had made the sale for the sum specified in the instructions of the plaintiff to it, and had fully accounted for the proceeds thereof. So far as the question of agency was concerned, the complaint stands unchanged; but the question of value was not of any importance under the complaint as it originally stood, and it is vital now. If, however, we expunge from the record the plaintiff's evidence in this respect, there remains the *prima facie* case, calling for the direction of a verdict for the face value of the paper, there being no countervailing evidence in the record; and, as we shall see, the court did in effect strike out the plaintiff's testimony as to value. But it may be urged that a cross-examination of the plaintiff on the question of value would have forced from him testimony that the paper was worth less than its face, and that therefore the defendant has been denied a right for which the expunging of the evidence from the case will not compensate it. It may be claimed

54 that by such cross-examination the defendant might have overthrown the *prima facie* case made by the papers them-

selves. But the evidence of plaintiff, in which he stated his opinion of the value of the paper, was incompetent, and, as we shall see, was in effect stricken from the case. Any cross-examination along the same lines must, of course, have fallen with the direct examination on which it rested. Had the defendant cross-examined the plaintiff in this respect the court must have stricken out the cross-examination containing his expression of opinion as to value, as well as his direct examination on that point. So far as plaintiff's deposition contains testimony as to the value of the land, the error, if any, in not permitting the defendant to cross-examine as to this item of evidence or object to it is without prejudice, for the reason that defendant does not deny, but, on the other hand, practically admits, that the security was adequate; and, even if it were inadequate, the value of the notes would not in law be thereby affected, the makers being solvent.

On the trial defendant offered to prove that plaintiff's attorney knew that defendant was the owner of the notes before this action was commenced; but this was not an offer to prove that plaintiff or his attorney then knew that the defendant had in violation of its duty to plaintiff sold the notes to itself. The fact offered to be proved was entirely consistent with the subsequent purchase of the notes by the defendant; and this was the most natural inference to be drawn by the plaintiff, because he would not have readily concluded that the defendant had not stated the truth in its letter of October 7th, in which it reported and charged a commission for the sale of the paper to a third person. Had the defendant offered to show that plaintiff or his attorney knew before commencing the action that defendant had sold the notes to itself, such offer would have disclosed a defense to the action, for it is undisputed that plaintiff originally sued on a theory of a sale of the notes by defendant, his action being to recover the proceeds of such sale. If, with knowledge of the breach of duty by the defendant, and consequently that the plaintiff might at his option repudiate the transaction and hold the defendant responsible for the value of the
55 paper or recover the paper itself, the plaintiff had elected to treat the conduct of the defendant as legal and ratify the sale by essaying to recover the proceeds thereof, he would have been forever debarred of the right to hold the defendant liable on any other theory, and especially on a theory bottomed on the illegality of the defendant's conduct. This principle was recognized in our decision of this case on the second appeal. See 5 N. D., 80–88; 64 N. W., 114. But the offer was not to show that plaintiff or his attorney knew before bringing suit that the defendant had sold to itself, but merely that, at a time subsequent to the sale of the paper by defendant, plaintiff knew that defendant was the owner thereof. Nor did defendant offer to prove this fact as tending to show that plaintiff knew that the defendant sold to itself, but solely for the purpose of establishing the fact that plaintiff knew before suing that defendant did in fact own the paper. In making the offer counsel for defendant said: "We offer this for the purpose of showing that plaintiff, through his counsel, Mr. Phelps, had knowledge at the time the ac-

tion was brought and knew that the defendant owned the paper and claimed to own it." The defendant offered to prove by its cashier that he had a conversation with plaintiff in December, 1895, which was subsequent to the third trial of this case, and "that plaintiff in such conversation admitted to the witness that he had never considered either Titus or the bank as his agent; that he had always denied such agency and refused to allow $35 commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner." It is obvious that this offer is merely to prove what plaintiff's construction of the correspondence between him and defendant was. That correspondence constituted a contract, which we have held as a matter of law created the relation of principal and agent. It is well settled that the construction of a written agreement is for the courts, and that neither party thereto can be permitted to control the meaning of such contract by an expression of his understanding of it. Had the defendant sold the notes to a third person and sued plaintiff for the small commission or deducted the amount thereof from the proceeds of the sale, plaintiff would not have been permitted to insist that he
56 did not understand that defendant was acting as his agent. The writing would have controlled.

It is a matter of no moment that the contract is contained in several letters and telegrams instead of in a single paper. When all are taken together they constitute the written agreement of the parties, precisely the same as if they were all embodied in one instrument. All the defendant offered to prove was that the plaintiff stated his view of the legal effect of the agreement between himself and defendant. His alleged admission is not equivalent to a consent that defendant should purchase the paper. By bringing the action, or, rather, by amending his complaint as soon as he discovered the facts, he evinced a purpose not to permit the defendant to purchase the paper, but to treat its attempted purchase thereof as unlawful. Undoubtedly the plaintiff might, despite the agency, have consented that the agent should buy at a specified figure, and if defendant after making the purchase had informed plaintiff of the fact, the latter could have elected to ratify the transaction; but the offer was not to prove such facts, but merely that plaintiff's view of the agreement was that it did not establish the relation which it actually did establish. Plaintiff would not have been permitted to prove his understanding of the legal effect of the correspondence to defeat defendant's right to commissions; neither can defendant prove it to escape the duties which the law casts upon it because of such relation. What the contract was and what consequences flow from it are both matters of law, and therefore beyond the control of the opinion of witnesses or parties. The offer did not point to any agreement different from that embraced in the letters and telegrams between the parties. There was no attempt to contradict or vary the terms of this agreement, but only an effort to govern its legal effect by the statement of a party. Whatever plaintiff may have thought, the law declares that defendant was plaintiff's agent, and as such was powerless to sell to itself. The law does not concern itself

with any question of injury to the principal, but makes the sweeping assertion that under no circumstances can the agent without the consent of the principal buy the property himself. The power vested in him to sell is limited to third persons. The law writes into the instrument conferring an authority a positive prohibition
57 against the purchase of the property of the agent himself unless the principal assents thereto. See the opinion in this case in 5 N. D., 80; 64 N. W., 114, and cases cited at page 83, 5 N. D., and page 115, 64 N. W. Even though the agent pays more for the property than any one else is willing to pay, or more than it is worth, the purchase by him is without right and may be repudiated by the principal on discovering the fact. The inquiry is never whether the principal has been prejudiced or the agent has made profit out of the purchase of the property. Without regard to either of these questions, the transaction is void, because unauthorized by the principal. It does not differ from any other act of an agent in excess of his authority. It therefore matters not the least whether the plaintiff was governed by the representations of the defendant as to the short crop or the tight money market in fixing the price at which he was willing to sell. The law says upon undisputed facts that the defendant was his agent in making the sale, and that therefore it could not sell to itself.

The question of *ultra vires* has been already discussed in a previous opinion. See 67 N. W., 821. We have nothing to add on that point except that the question appears to us to be immaterial. The plaintiff when it authorized a sale by defendant as its agent did in contemplation of law decline to sell to the agent on the terms agreed or any terms, there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always in contemplation of law is in the attitude of being unwilling to sell to the agent on any terms. Whether the defendant was authorized by the law to act as agent for the plaintiff is therefore of no moment, because, even if we concede this proposition, it still remains true that he had never agreed to a purchase of the notes by the defendant, and hence it follows that defendant's assumption of ownership of them, as though plaintiff had assented to a purchase of them by defendant, constituted a conversion thereof. The recent decision of the Federal Supreme Court cited by counsel for appellant (Bank *vs.* Kennedy, 17 Sup. Ct., 831) does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal on the subject of the
58 authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the record now before us. In its answer and the brief of its counsel the defendant admits that the writing of the letters referred to was its act and not the act of an unauthorized agent. By its own pleading and admission it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

It is urged that inasmuch as the trial court admitted, over objec-

tion, the evidence of the plaintiff as to the value of these notes, the plaintiff is estopped to insist that similar evidence on the part of the defendant is incompetent. Had the trial court permitted the defendant to introduce such evidence and had the defendant been successful in the case, we are inclined to agree with counsel for defendant that plaintiff would not be heard to claim that evidence of the same class which he successfully contended, against objection, was competent when offered by himself was incompetent when offered by his adversary. But the learned trial judge, by refusing to receive defendant's evidence of the same character, in effect ruled that all such evidence was incompetent; and he must be deemed to have changed his former ruling and to have stricken out plaintiff's evidence on this point, for the verdict (directed) by him was for the amount of the presumed value of the notes, with interest, less what had been paid the plaintiff by defendant. The testimony of the plaintiff was ignored by the court. Without it, a conclusive case as to value had been established, no legal evidence to overthrow the statutory presumption as to value having been offered. By ruling that evidence of the same kind offered by defendant was incompetent and by basing his direction of the verdict upon the statutory presumption as to value, so far as the element of value was concerned, the district judge clearly decided that plaintiff's evidence as to value was incompetent, and it is palpable that he disregarded it. While a party may waive his right to object to incompetent evidence by offering and insisting on the reception of incompetent evidence of the same class, despite his antagonist's
59 objection to it, yet the trial court may at any time change its ruling admitting such evidence and direct that it be stricken out. That is what was done by the district court in the case at bar.

We have carefully examined all the other questions presented by counsel for appellant. The length of this opinion forbids a more specific reference to them, in view of the fact that they appear to us to be of little importance and to involve no difficult problems. We are satisfied that there is no prejudicial error in the case, and the judgment is therefore affirmed.

(Signed) GUY C. H. CORLISS,
Chief Justice.
J. M. BARTHOLOMEW,
Associate Justice.
ALFRED WALLIN, *Do.*

STATE OF NORTH DAKOTA:

In the Supreme Court, October Term, 1897.

ALEXANDER ANDERSON, Plaintiff and Respondent,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, N. D., Defendant and Appellant.

Petition for Rehearing.

To the honorable the chief justice and associate justices of the supreme court of the State of North Dakota and to said court:

Your petitioner, The First National Bank of Grand Forks, North Dakota, appellant, respectfully represents to and shows the court:

That upon the hearing and determination of this action upon the appeal submitted at the September, 1897, term of this court, and in the opinion therein filed October 4th, 1897, the court overlooked and misapprehended the record and the law applicable thereto in the following particulars:

I.

This court overlooked and misapprehended the record and the law applicable thereto in relation to the want of power or authority of the cashier of a national bank to bind his bank by contract
60 to assume the duties and responsibilities of an agent for the respondent Anderson to sell the notes and mortgage for respondent to a third person or third parties, and thereunder that appellant's answer admits the writing of the letter of October 7th, 1891, and of no other letter or telegram shown in the record, and that such letter comprised no part of the pretended written contract that the bank would assume and undertake the powers or duties of such agency, and that appellant's brief nowhere admits that any other telegram or letter was written by or with the authority of the bank, and consequently no admission of authority from the bank to its cashier, Titus, to make such pretended contract.

II.

This court apparently has overlooked, or has decided only by reference to a former opinion, the other and independent question whether the appellant bank itself had power under the national bank act, or other statute of the United States prescribing the powers of national banks, to bind itself that it would assume and perform the duties and obligations of an agent for the sale of the notes and mortgage for respondent to a third party or to third parties, and hereunder, and in view of the silence of this court upon that question, and in view of the limitations imposed by the national bank act and other acts of the Congress of the United States and decisions by the circuit court of appeals of the United States for the eighth circuit, your petitioner says that this court has overlooked and misapprehended said question and the law applicable thereto, and has denied a right, privilege, and immunity set up and claimed by ap-

pellant under the Constitution and statutes, to wit, to be exonerated from liability on account of a contract not within the power of a national bank to make or to perform, and which contract and the pretended duties, liabilities, and obligations whereof are *ultra vires*.

Wherefore your petitioner prays the court that a rehearing of and a re-examination of the issues of law arising upon this appeal be granted, and that the court clearly determine and express its opinion and judgment upon the above and foregoing questions of law, and that the opinion in relation to admissions of appellant be corrected to conform to the record now before the court, and
61 that upon such rehearing appellant be adjudged entitled to the above rights, privileges, and immunities, and thereupon the judgment of the court below be reversed.

Dated Grand Forks, North Dakota, October 12th, 1897.

BURKE CORBET,
Attorney for Appellant.

File No. 481.

STATE OF NORTH DAKOTA:

In the Supreme Court.

ALEXANDER ANDERSON, Plaintiff and Respondent,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, Defendant and Appellant.

Appeal from the district court of Grand Forks county.

This action coming on to be heard at the special September, A. D. 1897, term of this court, at the supreme court, in the city of Fargo, State of North Dakota—present, Guy C. H. Corliss, chief justice; J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by Burke Corbet, for the appellant, and by Phelps & Phelps, for the respondent, and the court having advised thereon and having decided that the judgment herein should be affirmed, and the appellant having applied for a rehearing herein, and his application having been denied, and he having exhausted every remedy in the State courts, and nothing remaining to be done herein but the purely ministerial act of entering judgment of affirmance in the district court, it is now here—

Considered, ordered, and adjudged that the judgment of the district court within and for said Grand Forks county appealed from herein be, and the same is hereby, in all things affirmed. And it is—

Further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court. And it is—

62 & 63 Further considered and adjudged that respondent have

and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated Oct. 13th, 1897.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:
[SEAL.] R. D. HOSKINS, *Clerk.*

A true copy.
Attest:
[SEAL.] R. D. HOSKINS, *Clerk.*

64 STATE OF NORTH DAKOTA:

In the Supreme Court.

ALEXANDER ANDERSON, Plaintiff and Respondent,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, Defendant and Appellant. } At Law.

Petition for Writ of Error.

And now comes the defendant and appellant herein, The First National Bank of Grand Forks, North Dakota, and says that on or about the 13th day of October, 1897, this court entered judgment herein in favor of the plaintiff and against the defendant, The First National Bank, aforesaid, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant; all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore the defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, and that a supersedeas be allowed upon lodging with the clerk of this court its bond, according to law, therefor.

Dated, etc.

W. E. DODGE,
Attorney for Defendant and Appellant.

65 In the Supreme Court, State of North Dakota.

ANDERSON
vs.
BANK. } At Law.

Assignment of Errors.

The defendant in this action, The First National Bank of Grand Forks, N. D., in connection with its petition for a writ of error,

makes the following assignment of errors which it avers occurred upon the trial and determination of the cause in this the supreme court of the State of North Dakota, to wit:

I.

The court erred in denying defendant's assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the admission of plaintiff's evidence, and wherein this court erroniously ruled and adjudged that the district court did not err in the admission of such evidence, in the following instances, to wit:

(1.) In assignment of errors number one (1), that the district court erred in overruling and denying defendant's objection made at the first offer of evidence on behalf of the plaintiff, wherein defendant objected to the introduction of any evidence on behalf of plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action; which objection was overruled by the district court, and exceptions to such ruling were duly taken, allowed, and preserved, and which ruling was affirmed by this the supreme court of North Dakota, the complaint stating a pretended cause of action which on the face thereof was based upon a pretended contract on the part of the defendant bank which
66 by the statutes of the United States was not within the powers of a national bank to make and upon the face thereof was *ultra vires* and void.

(2.) In assignment of errors number fifty (50), that the district court erred in overruling and denying defendant's objection to Exhibit "E," the letter dated Grand Forks, September 14th, 1891, addressed to Mr. Alex. Anderson, Seattle, Wash., and signed S. S. Titus, Cr., wherein is contained the pretended offer to act as agent in the following words: "If I had a basis to work on, I might find some one who would take the paper. You offered it at $350.00 discount. We offered you a trade at $1,000.00 discount. Now, if you will make it $700.00 or $800.00 and allow us a small commission, I will try and place the paper for you;" which ruling by the district court was affirmed by this the supreme court of North Dakota, although the contract sought to be established thereby was one which, under the national bank act, a statute of the United States, was not within the powers of a national bank to make or to perform and was *ultra vires* and void, and under which statute it was not within the powers of the cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgage to third persons, and the act of the cashier in writing such letter was *ultra vires* and void.

(3.) In assignment of errors number seventy-four (74), concerning like objections to the introduction in evidence of the same letter as Exhibit Eleven (11) upon identification thereof by the witness S. S. Titus.

(4.) In assignment of error number ninety (90), wherein the district court erred in overruling and denying defendant's motion to strike out the letters of September 14th, 1891, being Exhibit "E,"

and also identified as Exhibit "11," as above stated, on the ground that it was *ultra vires*, and also not shown to have been the act of the defendant bank, which erroneous ruling was affirmed by this the supreme court of North Dakota, although the contract of agency held by this court to be proved to be established thereby was, as the contract of a national bank, *ultra vires* under the national bank act, and the act of the cashier in undertaking to bind his bank by such contract was *ultra vires* under said act.

67 (5.) In assignment of errors number one hundred and forty-seven (147), concerning the admission of said letter, Exhibit "E," admitted over defendant's objections and the admission adjudged to be proper by this court.

(6.) In assignment of errors number one hundred and forty-five (145), wherein defendant assigned error in admitting evidence of the pretended telegram of October 3rd, 1891, as follows: "Did you receive our letter September 14? Wire us your best offer, so we can advise a party who said he would hold his money until we hear from you. First National Bank"—upon the grounds that there was no evidence of the identity or authority of the writer or sender, if any, and the agency, if established, was *ultra vires*, and the act of any officer contracting that the bank would act as agent would be *ultra vires;* which express claim for immunity against liability, both on account of *ultra vires* acts of the cashier and also on account of *ultra vires* contracts by the bank itself, was by this supreme court of North Dakota erroneously denied.

II.

The court erred in denying defendant's assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the rejection of evidence offered by defendant, which erroneous rulings were affirmed and sustained by this the supreme court of North Dakota, which court erroneously denied defendant a reversal of the judgment of said district court and erroneously affirmed said judgment, and erroneously rendered and entered judgment against defendant in said action notwithstanding such errors by the court below, and that the said erroneous rejection of evidence was in the following instances, to wit:

(1.) In assignment of errors number one hundred and twenty-three (123), wherein J. Walker Smith, president of the board of directors of the defendant bank, was produced, sworn, and examined as a witness in behalf of defendant and shown competent to testify to the facts, and was asked on behalf of defendant, "Did the board of directors of the defendant bank in any way ever authorize Mr. Titus to act for and in behalf of the bank, constituting

68 the bank thereby the agent of the plaintiff for the sale of the notes in litigation?" which question was objected to by plaintiff on the ground that it was incompetent, irrelevant, and immaterial; which objection was erroneously sustained by the district court, and exceptions to such ruling were duly taken, allowed, and preserved and duly submitted to this the supreme court of the State

of North Dakota, wherein such ruling was erroniously affirmed and judgment rendered against defendant notwithstanding such error, though under the statutes of the United States the cashier, Titus, could not render defendant liable by his acts without such express authority, and any act on the part of such cashier attempting to contract for or on behalf of the bank that it would assume or undertake any of the duties, obligations, or liabilities of plaintiff's agent for the sale of said notes to third parties, if established, was *ultra vires* and void.

(2.) In assignments of errors number one hundred and twenty-four, wherein defendant offered to prove by said witness, J. Walker Smith, that the defendant bank did not in any way, either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the defendant bank, constituting the bank the agent of plaintiff for the sale of the seven promissory notes in litigation; which evidence the district court erroniously excluded upon plaintiff's objection that it was irrelevant, incompetent, and immaterial; to which ruling exceptions were duly taken, allowed, and preserved and duly submitted to this the supreme court of North Dakota, wherein said ruling was erroniously affirmed and judgment has been erroniously rendered and entered against defendant notwithstanding such error, although it manifestly appeared that such ruling was in conflict with the statutes of the United States, and denied to defendant a right, privilege, and immunity claimed by defendant under such statutes that it should not be liable for *ultra vires* acts of its cashier.

(3.) In assignment of errors number one hundred and twenty-five (125), wherein defendant offered to prove by said witness, J. Walker Smith, that the board of directors of the defendant bank never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, the agent of plaintiff for the sale of the seven promissory notes, which evidence was erroniously
69 excluded by the district court upon the same objections, and such ruling, duly presented and submitted to this the supreme court of North Dakota, was erroniously affirmed and judgment erroniously entered, though such ruling erroniously denied a right, privilege, and immunity expressly claimed by defendant under the national bank act, a statute of the United States.

(4.) In assignment of error number one hundred and fifty-four (154), wherein defendant assigned as error that the district court erred in excluding the testimony of J. Walker Smith that no authority was conferred upon any officer to, nor *was* any steps taken whereby the defendant bank could engage to, act as agent for the sale of these notes or otherwise, because any contract to that effect is *ultra vires* and not within the implied or customary powers of officers of a national bank; which claim for immunity from *ultra vires* acts of officers and from liability on account of *ultra vires* contracts by national banks themselves thus expressly set up was erroniously denied by this the supreme court of North Dakota.

III.

The supreme court of the State of North Dakota erred in denying to defendant the immunity conferred upon defendant as a national bank by the statutes of the United States, that it should not be liable on account of *ultra vires* acts of its cashier, and not even by *ultra vires* contracts by the bank itself; which immunity was expressly claimed by defendant in the district court wherein the case was tried, and in this the supreme court of said State, when brought here upon appeal, and in the following instances, to wit:

(1.) In assignment of errors number one hundred and fifty-six (156), wherein defendant assigned as error that the district court erred in directing a verdict for plaintiff for the amount directed or for any amount; which ruling was affirmed by this the supreme court of North Dakota, although the verdict was based upon a complaint which set up a cause of action solely upon an *ultra vires* contract, and was supported, if at all, only by evidence of such *ultra vires* contract made by the defendant's cashier without authority.

(2.) In assignment of error- number third (III) of the 70 & 71 assignments of errors annexed to and written out at length at the close of defendant's brief, wherein defendant assigned error as follows: "Appellant" (this defendant) "further says there was manifest error" (by the district court) "in rendering judgment against appellant in this action for each of the foregoing reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the United States against liability on account of *ultra vires* acts of their officers and *ultra vires* contracts of the banks themselves;" which erroneous judgment was erroniously affirmed by this the supreme court of North Dakota, notwithstanding such claim and right to immunity under said statute of the United States.

IV.

The supreme court of North Dakota manifestly erred in denying to defendant, by giving judgment against it, the immunity claimed and set out by defendant under the statutes of the United States against liability on account of *ultra vires* acts of its cashier and *ultra vires* contracts by the bank itself, whereon alone judgment was demanded and rendered.

V.

The supreme court of North Dakota erred in denying defendant's petition for a rehearing upon the ground that such court had overlooked and disregarded the record and the law applicable thereto in relation to the want of power or authority of the cashier of a national bank to bind his bank by contract to assume the duties and responsibilities of an agent for plaintiff to sell the notes and mortgage for plaintiff to a third person; also that this court overlooked and disregarded the record and the law applicable thereto in relation to the power of a national bank itself in any manner by contract to assume the duties and responsibilities of such agent, and

had thereby denied defendant a right, privilege, and immunity claimed by it under the statutes of the United States.

Dated Grand Forks, North Dakota, Oct. 18, 1897.

BURKE CORBET,
Attorney for Defendant, First National Bank of Grand Forks.

72 Upon the foregoing record and the petition for writ of error an order allowing writ of error was granted, the writ of error duly issued, supersedeas bond was duly filed, citation was duly served, and the writ of error and returns thereto have been duly filed in the office of the clerk of the Supreme Court of the United States under the title first above set out.

Plaintiff in error submits the assignments of error attached to and presented with its petition for writ of error, and found on pages 65 to 70 of this statement, as its statement of the errors on which it will rely in the further proceedings in this case and the foregoing portions of the record in support thereof.

Dated Grand Forks, North Dakota, March 28th, 1898.

W. E. DODGE,
BURKE CORBET,
Attorneys for Plaintiff in Error.

W. E. Dodge, Minneapolis, Minn.
Burke Corbet, Grand Forks, N. D.

73 Supreme Court of the United States, October Term, 1897.

FIRST NATIONAL BANK OF GRAND FORKS, N. D., Plaintiff in Error,
vs.
ALEXANDER ANDERSON, Defendant in Error.
} No. 557. Notice.

To Henry W. Phelps and Phelps & Phelps, attorneys for defendant in error:

Take notice that Burke Corbet, of Grand Forks, North Dakota, will file his præcipe for appearance in Supreme Court, asking that his appearance be entered as attorney for the plaintiff in error in the above-entitled action.

Dated Grand Forks, North Dakota, March 28th, 1898.

BURKE CORBET,
Attorney for Plaintiff in Error.

74 In the Supreme Court of the United States, October Term, 1898.

FIRST NATIONAL BANK OF GRAND FORKS, N. D., Plaintiff in Error,
vs.
ALEXANDER ANDERSON, Defendant in Error.
} No. 223.

The above-named parties, by their respective counsel, hereby stipulate that the printed record for the above-entitled cause be pre-

pared by the clerk of the Supreme Court of the United States by using as the copy therefor the parts of the record hereunto annexed.

And we further stipulate that the record thus to be printed be the record to be used on the determination of the motion to dismiss and affirm heretofore submitted by the defendant in error, and if said motion be denied that the same record is to be used on the merits. This stipulation, however, is not intended to preclude the consideration by the court of the reported decisions of the supreme court of the State of North Dakota in the case of Alexander Anderson against The First National Bank of Grand Forks, N. D., out of which the present cause arose, reported in 59 N. W. Rep., 1029; 64 N. W. Rep., 114, and 67 N. W. Rep., 821, as well as in 72 N. W. Rep., 916.

BURKE CORBET,
Attorney for Plaintiff in Error.
HENRY W. PHELPS,
Attorney for Defendant in Error.

75 [Endorsed:] Case No. 16,770. Supreme Court U. S., October term, 1898. Term No., 223. The First National Bank of Grand Forks, North Dakota, pl'ff in error, *vs.* Alexander Anderson. Agreed record. Office Supreme Court U. S. Filed Aug. 30, 1898. James H. McKenney, clerk.

In the Supreme Court 1

OF THE UNITED STATES.

FIRST NATIONAL BANK,
of Grand Forks, N. D.,
Plaintiff in Error, 2

vs.

ALEXANDER ANDERSON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

3

ON MOTION TO DISMISS AND AFFIRM.

I.

The motion presented by the defendant in error, being a motion to dismiss and affirm upon technical grounds without a full examination of the merits;

plaintiff in error respectfully submits to the court, that it is proper to point out, in the first instance, defects in the motion and motion papers on account of which the motion should be disregarded.

First. The notice, motion and motion papers furnished the attorneys for plaintiff in error and
4 filed, are subscribed in a co-partnership or firm name and not the name of an individual, as attorney for the defendant in error. Plaintiff in error is not advised that the several members of such firm, or any one of them, is an attorney of this court, or that there has been any appearance in this court, for defendant in error, by any attorney of this court, or any person authorized to appear or to move the
5 court to dismiss or affirm.

Second. The record has not been printed and cannot be printed prior to the hearing upon the motion. Where the record is not printed, motion to dismiss will not be considered. (National Bank vs. Insurance Company, 10 Otto, 43.) This is especially true where, as in this case, it is admitted that upon
6 the record this court has jurisdiction, and the motion is not made upon the ground that a federal question was not involved and decided, but upon the ground that the federal question so involved and decided was not necessary to the determination arrived at, and that the decision was manifestly correct.

In order to determine whether or not the federal

question was involved in the determination of the state court, and whether or not plaintiff in error has been wrongfully denied a right or immunity claimed by it under a statute of the United States, it will be necessary to look into the entire record.

This is also true where, as in this case, the decision of the federal question by the state court on 7
the face of it, is in direct conflict with the decisions of this, the Supreme Court of the United States. And when the decision of the state court can only claim support, if any, in some peculiar fact of the case to change and reverse the established law as to the powers and liabilities of national banks.

The printed extracts from the record or proceed- 8
ings in the court below, annexed to the motion, do not comply with the requirement that the record be printed in conformity with the rules of this court.

The printed extracts do not purport to be, and in fact are not, but a small part of the record in the state court. Nor are they but a small part of the record necessary for consideration upon the question 9
raised by this motion.

Third. There is no color of right to a dismissal, and therefore the motion to affirm should not be considered. (See Whitney vs. Cook, 9 Otto, 607.)

Defendant in error in effect admits that he has no right to claim a dismissal, and his motion and

motion papers show clearly that a federal question was raised and decided by the state court against plaintiff in error, and that plaintiff in error has been denied an immunity claimed by it under a statute of the United States, and the motion is merely a motion to affirm.

10 Fourth. This motion, while denominated a motion to dismiss and affirm, is in effect an attempt on the part of the defendant in error to submit the cause on the merits, and upon the very questions involved in the merits, upon extracts of the record of the court below, selected by himself, and is not within the provisions of any rule of this court allowing motions to dismiss or affirm.

11

II.

Passing next to the merits of the questions intended to be presented by the motion, plaintiff in error respectfully submits that upon the full record it conclusively appears.

That the federal questions raised by plaintiff in
12 error were necessarily involved in the merits of this action from its commencement, and in all the proceedings therein in the state, district, and Supreme courts. That a determination of such federal questions were necessarily involved in the decision and judgment of the State Supreme court, without which such decision could not have been arrived at, or such judgment rendered, by the state court, either upon

settled pre-existing rules of general jurisprudence, or even upon the state court's own construction and application of such general rules.

These federal questions may be combined into two general ones:

First. Is it within the powers of a national 13
bank to engage in the business of selling mortgage notes on commission?

Second. Is it within the powers of a cashier of a national bank to bind his bank by contract to assume the duties, obligations and liabilities of an agent for the sale of mortgage notes to third persons? 14

This is not a case where a national bank assumed to act as agent and thereby obtained possession of notes, and then by some tortious act converted them to its own use. The notes were pledged to, and rightfully in the possession of the bank long before it is claimed there was any suggestion of agency, and remained there throughout the transaction, and until long after the commencement 15
of this action, without change of form, location, condition or possession.

Nor is it a case where a national bank assumed to act as agent and as such deceived its principal to his injury. While defendant in error averred in his amended complaint that he relied upon the letters

and telegrams from the bank and was misled thereby and believed there had been a sale to a third party, this allegation was expressly denied in the answer, he offered no evidence in its support, the state courts excluded evidence offered by plaintiff in error that it was not true. The State Supreme court held it to
16 be immaterial, and neither court nor defendant in error claimed or ruled upon any deception as a basis for the pretended conversion.

Nor is this a case where a national bank by any tortious act or omission actually converted the property of another.

There is no pretense of any actual conversion of the notes.

17

The pretended conversion, according to the claim of the defendant in error, and the decision of the State Supreme court, is based solely upon the following narrow, technical grounds:

First. Certain letters and telegrams passed between the cashier of the bank and defendant in error, which were construed to constitute *in law* a
18 *contract* of agency, and that such construction was solely for the court, and the understanding of the parties thereto was wholly immaterial.

Second. That while this contract of agency existed, an attempted purchase or discount of the notes by the agent without the express consent of the principal would constitute a wrongful conversion

of the notes without regard to the intent of the parties.

Third. That the principal offered to sell the notes at a certain price and the agent assumed to become the purchaser and paid the price, and thereby wrongfully converted the notes.

19

We do not think that such would be the law anywhere except in North Dakota, even if plaintiff in error were a natural person instead of a national bank. It is, however, within the province of the Supreme court of that state to determine, and having determined it, it is the law of that state, and especially is the law of this case, except as to the federal questions involved.

20

Upon these grounds the judgment of the state court depends. Whatever question is necessarily involved in any of these propositions is necessarily involved in the judgment.

Even under this construction of the law the purchase or discount of the notes by the bank would not be in itself a wrongful act, nor amount to a conversion in the absence of a valid binding contract of agency.

21

The ruling upon the exclusion of evidence of the understanding and intent of the parties, and that the legal construction of the letters and telegrams by the court should alone be considered excludes all

pretense of an actual agency as distinguished from a legal one.

The pretended conversion consisted not in the commission of a wrongful act, but in the technical violation of a pretended contract. If the contract were not legal or valid, it follows that there was no
22 contract to violate. If it were a contract, which it was not, within the power of a national bank to make, there was no contract *in law* to be created by judicial construction from the letters of the parties. If the contract contained in those letters was not one which was within the powers of the cashier of a national bank to make on behalf of the bank, no
23 construction of their contents could create therefrom a valid contract or render an otherwise rightful act tortious.

What might have been the result had the bank in fact exercised any of the powers of an agent we need not discuss, for it is not claimed that the bank ever did exercise such powers.

24

What might have been the result had the defendant in error relied upon the bank as his agent is equally immaterial, for upon the record and the exclusion of evidence offered it must be conceded that he never considered the bank his agent for any purpose.

How a mere technical violation of an executory contract by an act otherwise rightful can amount to the commission of a tort we are not called upon to explain, we are not responsible for the decision that it does. We simply say that the conversion claimed and adjudged is just that conversion and none other, and that the existence of a valid, binding contract of agency is necessary to that kind of a conversion. 25

A contract of agency is the very foundation of this action, not an actual agency, nor the exercise of the powers of an agent, but a contract which prohibited the bank from accepting the offer of defendant in error to sell the notes at a price fixed by himself. 26

It is true the learned chief justice of the state court said in the opinion, that that court deemed the question of ultra vires immaterial. On that point the opinion of the state court does not govern. The statement is little more than dictum. It is inconsistent with the essential elements of the opinion, and is totally unsupported by the record. The course of reasoning is illogical. He says there was a contract, for the letters *in law* constituted one. There was an agency, for the contract *in law* constituted one. There was a prohibition against a purchase of the notes by plaintiff in error, because the agency *in law* constituted one. There was a conversion, because the prohibition and the purchase *in law* consti- 27

tuted one. And then, abandoning the premises, there being a conversion, which is a tort, it is immaterial whether there was any contract or not. Having arrived at his conclusion he says his premises are immaterial.

One expression of the opinion in this connection
28 deserves attention because it suggests an independent tort. It is said, "He," (the defendant in error) "never agreed to a purchase of the notes by defendant," (plaintiff in error) "and hence it follows that defendant's assumption of *ownership of them* constituted a conversion."

There is certainly nothing in the record which
29 remotely suggests any *assumption of ownership* by the bank. No act or claim of ownership by the bank is alleged in the complaint or intimated in the evidence. The alleged tort, if any, was in the act of purchase or attempted purchase, and not any subsequent act, omission or claim. The alleged tort, if any, was complete upon mailing the letter of October 7th, 1891.

30 What might be the effect, if it had been alleged and shown that the bank disposed of the notes or refused to return them upon a demand, we need not consider, for nothing of the kind is alleged or shown, on the contrary, the defendant in error by his election compelled the bank to retain the notes as owner.

It is true the bank in its answer avers a purchase directly from defendant in error as its version of the transaction; this allegation, however, certainly cannot be the *assumption of ownership* on which the action, commenced two and one-half years prior thereto, was based.

31

From whatever point of view we examine the action, we always come back to the one point, that the conversion, if any, consisted solely in the attempt of the bank on October 7th, 1891, by writing the letter and making the remittance of that date, to accept the offer of defendant in error and purchase or discount the notes itself. We say 32
attempt advisedly, for if defendant in error had not consented to such purchase, or did not consent to it, it was only an attempt, and that attempt, even under the legal principle enunciated by the state court, was not wrongful unless there existed a binding contract which prohibited the bank from offering to purchase.

Defendant in error claimed, and the state court 33
held that the authority of the cashier was not material, because the bank in its answer used the expression that the bank wrote the letter and made the remittance of October 7th, 1891, and also wrote defendant in error certain other letters, offering to purchase the notes from him. The language of the

state court is broad enough to include all letters as the act of the bank, but the answer is not.

The holding of the state court on this point does not control, but it lends the claim sufficient dignity to justify an answer. If the expression stood alone and unexplained it might amount to a formal admis-
34 sion that these particular letters were the acts of the bank in so far as any, or possibly all the officers, could make them its act. For being a corporation and not a natural person, the most specific and positive admission can amount to no more than that the officers of the bank wrote the letters and made the remittances in its name, but coupled with an express
35 statement of the facts and a copy of the letter showing it was written by the cashier, then to say the expression amounts to more than that the cashier wrote the letter is a mere play upon words.

These letters were no part of the alleged contract of agency which, as set out in the complaint, consisted only of a pretended telegram from the bank, dated October 3rd, 1891, and a telegram to the bank
36 dated October 5th, 1891. The pretended telegram from the bank was positively denied. The letter of September 14th, 1891, was neither referred to nor admitted in any pleading, while the agency was positively denied. The bank, by its cashier, by and in certain conversations, letters and telegrams had correspondence with defendant in error, wherein defend-

ant in error offered to sell the notes to the bank at certain discounts, and the bank offered to discount them at a greater rate of discount. The bank did this because it was done by the cashier for the bank, acting within his powers as cashier. When the cashier went outside his powers, and undertook to make a contract of agency, if he did, the act was not 37
the act of the bank, either in law or in fact. The bank offered to prove by proper evidence that no other officer or director or board of the bank participated in the transaction or authorized the cashier's acts. There is no question of ratification or estoppel by retaining the proceeds. The bank never claimed or held title or possession, or any right under the 38
agency.

Owing to the peculiarly technical character of the conversion claimed, we feel justified in making a brief statement of the transaction as it appears in the record.

About April, 1891, defendant in error pledged the notes to the bank. Between that date and October 7th, 1891, he wrote many letters offering to sell the 39
notes to the bank, and the bank offered to discount or buy them at certain prices. In his letters his offers to sell were based upon discounts *from the face* of the notes. It appears that he understood the expression "*the face*" to mean the principal and accrued interest. The cashier of the bank, on the

contrary, understood it to mean the principal sum only without interest. Defendant in error did not in any letter or telegram, either expressly or by implication, authorize or consent to any agency, unless the telegram of October 5th, 1891, "Will give discount of $500.00," contained such implied author-
40 ity, and in his letter of October 13th, 1891, he almost expressly repudiated any thought of agency by repudiating all charges and demanding from the bank as from a purchaser the balance of the price according to his understanding of the price fixed. His demand for such balance being refused by the bank defendant in error brought his action in March, 1893, for the alleged balance of such contract price,
41 $697.52, with interest after October 7th, 1891. A verdict was returned for the bank, and on appeal the verdict was sustained as to the principal issue, the amount of the contract price, but was reversed and remanded for a new trial on account of failure of proof of authority to pay, and payment of the charges for taxes, etc. In this opinion, however, the State Supreme court said the transaction was an
42 agency, and that the bank was the agent for the sale of the notes to unknown third parties. Acting upon this suggestion, upon the second trial defendant in error asked to amend his complaint to allege such agency, and that the bank sold the notes to itself and thereby converted the notes, etc., and for judgment for $1,232.52, substantially as contained in his

amended complaint, which amendments were refused on the grounds of a change of cause of action, delay, laches, and other causes, and a verdict was returned for defendant in error for the $102.52 charges and interest, and for the bank for the remainder, from which defendant in error appealed, and the cause was reversed and remanded for new trial with leave 43
to amend. The cause was tried a third time and verdict directed for the bank upon the ground, among others, that the alleged agency, if any, was ultra vires, either as the act of the cashier or as a contract by the bank itself. Upon a third appeal by defendant in error the State Supreme court held that the agency was within the implied powers of the 44
bank and not ultra vires, and remanded the cause for a new trial. Upon the fourth trial the bank, in order to properly present to this court the question of ultra vires, and that the pretended conversion was only a technical violation of a pretended executory contract of agency, challenged all pretended evidence of such contract of agency, and offered to prove by witnesses, sworn, examined and shown
competent, knowledge on the part of the defendant 45
in error before bringing the action that the notes still remained in the bank's possession, so he could have claimed them had he so chosen. Also his own construction placed by himself upon the contract, as he had personally stated it to the witness, that he had never considered the bank his agent for any pur-

pose, and that he had never authorized it to act as his agent for the sale of the notes, and of the construction placed by the bank on the transaction. The bank's evidence was excluded as tending to vary the terms of the written contract contained in the letters, and the court assumed that the construction
46 of that contract was for the court alone, also that the attempt to purchase during the existence of that contract was a conversion as a matter of law, and directed a verdict for defendant in error against the bank for the full amount claimed, and judgment was entered thereon. Upon the appeal by the bank from the judgment, the State Supreme court passed upon these questions: The admission of evidence of
47 agency, the exclusion of evidence of knowledge by defendant in error, and the construction placed upon the transaction by the parties, and sustained the ruling of the court below in each particular.

The exclusion of the bank's evidence was within the special jurisdiction of the state court, its determination thereon is final, and we cannot complain
48 of it here. Indeed, upon the state court's ruling that the attempt to purchase, without more, constituted a wrongful conversion, very probably renders the evidence immaterial. We have called this court's attention to it for the reason that it excludes all pretense of an actual conversion, or any conversion whatever, except upon the narrow, technical theory

we have stated, based solely upon a contract of agency.

III.

Even upon the partial record presented with the motion, that motion should be denied. It contains the amended complaint, and all the evidence tending 49
to show a wrongful conversion of the notes by the bank, and still at the utmost it presents only a technical violation, by the cashier, of an executory contract of agency entered into *by the cashier* that the bank would sell the notes for defendant in error, at a price fixed by himself, to some third person.

Divested of superfluous matter it, at the utmost, 50
shows that the cashier wrote two letters, that of September 14th, 1891, and October 7th, 1891, with remittances, and possibly a telegram of October 3rd, 1891. These were all acts by the cashier and no other act or omission is claimed.

It shows affirmatively (Folio 36) that defendant in error, with full knowledge of all the facts, in his amended complaint expressly waived the wrongful 51
element, if any, in the purchase of the notes, and elected to treat them as the property of the bank under the purchase.

The State Supreme court, contrary to the authorities and the legal principles applicable in such cases, held that defendant in error did not thereby

waive the right to demand and recover the full amount of the notes, principal and interest, as fully as in an action in trover. That a ratification of the purchase did not ratify the terms of that purchase.

That holding may be within the exclusive jurisdiction of the state court, and therefore finally settle
52 the law of the case as to the amount of recovery, but it goes no further.

It left the remaining effects of the waiver and election open, and it cannot be denied that by this waiver and election the defendant in error divested himself of all title to or interest in the notes at the date of the amended complaint, and that such
53 waiver and election reverted back to the time of the purchase thus ratified, vesting in the bank a perfect title on and at all times after October 7th, 1891, and that it prohibits him from complaining of any other or later act by the bank even if any had been shown, and restricts the alleged conversion to the attempted purchase thus ratified.

If there is any absurdity in holding that defend-
54 ant in error could expressly waive the wrongful element in the alleged sale of the notes by the bank to itself, and at the same time recover upon that act as a wrongful conversion; that he could waive the wrong and not waive the right to recover for it, that he could expressly ratify the sale or purchase, and at the same time recover damages because it was

wrongful; that he could ratify the purchase and repudiate the terms fixed by himself, we are not responsible for that absurdity, such was the decision of the State Supreme court against our most strenuous arguments. That we can have no redress against that decision does not render it any the le s important when it shows that the judgment is based 55
solely upon an agency which the bank had no power to undertake, and one created, if at all, by the unauthorized acts of the cashier, acting outside his powers, and in a matter outside the powers of the bank. Although defendant waived the tort and elected to sue as in assumpsit, or upon an implied contract to pay the actual value, the action none the
less rests upon the contract of agency. There is no 56
pretense of a recovery upon the terms of any con tract of sale.

IV.

One principal ground upon which plaintiff in error relies, and which appears in the record, is that the State Supreme court denied to it an immunity
claimed by it under the statutes of the United 57
States.

There is no question but that plaintiff in error throughout the proceedings in the state courts, did claim immunity against all liability on account of the alleged agency, upon the ground that the agency, if any, and all acts creating it, and all acts, if any,

done under it, were ultra vires, beyond the power of the bank as a bank, and beyond the power of the officers of the bank as such to do; and it is equally certain that the state courts positively denied that immunity. For the purpose of this motion it is wholly immaterial upon what ground the state
58 courts denied the immunity, whether upon the ground that the acts were within the powers of the bank, and its officers, or on the ground that the bank could not claim immunity against such acts, even if ultra vires. This court has just as full jurisdiction and power to relieve against an erroneous ruling on the last ground as on the first, and unless it mani-
59 festly appears that the decision of the State Supreme court was correct, there can be no ground for dismissal or affirmance on motion.

The question whether the agency and acts, if any, constituting a wrongful conversion of the notes was ultra vires, either as the act of the cashier or the bank itself, and whether, if so, the bank can set up that fact as a defense, are the real merits of the
60 case and should not be argued on this motion at any length. Upon these questions and especially that the bank can rely on the question of ultra vires, the case of California Nat. Bank. vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. Rep. 831, and Farmers and Merchants Nat. Bank vs. Smith, 77 Fed. Rep. 129, by the Circuit Court of Appeals in the Eighth circuit,

we think sufficient authority that the judgment of the State Supreme court is not manifestly correct.

To the claim that the writ of error was improvidently allowed, or was sued out for delay only, we think no answer needed or justified and respectfully submit to the consideration of the court the foregoing objections to the motion.

Dated Grand Forks, North Dakota, December 29th, 1897.

W. E. DODGE,
Attorney for Plaintiff in Error,
Minneapolis, Minn.

BURKE CORBET,
Of Counsel, Grand Forks, N. D.

Supreme Court of the United States

Brief of Corbet for P. E.

OCTOBER TERM, 1898.

NO. 223.

Filed Oct. 24, 1898.

RST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

EXANDER ANDERSON,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Burke Corbet and W. E. Dodge, Attorneys for Plaintiff in Error.

The Plaindealer Co., Grand Forks, N. D.

Supreme Court of the United States

OCTOBER TERM, 1898.

NO. 223.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action at law brought in the District Court of North Dakota, March 25th, 1893, by the defendant in error, Alexander Anderson, a resident of Seattle, Washington, who was known in such District Court as plaintiff, and in the Supreme Court
2 of North Dakota as respondent, against the plaintiff in error, The First National Bank of Grand Forks, North Dakota, a banking corporation organized and acting under the National Bank Act, and known in the District Court as defendant and in the State Supreme Court as appellant.

The cause of action, if any, is based upon an alleged implied contract that the bank would pay Mr. Anderson the balance of the presumptive value on October 7th, 1891, that is the face and accrued interest then amounting to $7,630.00, of seven promisory notes for $1,000.00 each, dated October 1st, 1890, one due December 1st each year from 1891 to 1897 inclusive, with interest at 9 per cent., secured by mortgage on land, made by John A. Wilson and others, payable to, and owned by Mr. Anderson at all times prior to October 7th, 1891, and by him endorsed, assigned and transferred to the bank on April 6th, 1891, as collateral security for his note for a loan of $2,000.00 and which notes and mortgage he alleges the bank wrongfully converted to its own use October 7th, 1891, and remitted to him $6,397.48, being his note for $2,000.00 and cash $4,397.48, which he has ever since retained; he having elected to waive the tort and sue the bank on the alleged implied contract.

The conversion, if any, consisted in a technical violation of an alleged written contract of agency, in the form of letters and telegrams between S. S. Titus, as cashier of the bank, and Mr. Anderson, by the terms of which, it is claimed, the bank assumed and

undertook the duties and liabilities of an agent, to sell the notes and mortgages for Mr. Anderson to some third person,
3 that is, any purchaser, no third person being named or in any way was designated; and that the bank in violation of its duties as such agent assumed and undertook to purchase the notes itself and remitted therefor $6,397.48 as stated above, and thereby wrongfully converted the notes and mortgage to its own use. (See the amended complaint of the defendant in error in the printed record, page 2. The pages hereinafter cited, unless otherwise specified, refer to the pages of such printed record.)

Plaintiff in error expressly denied any agency or any conversion, denied that its business included any agency for the sale of notes, mortgages or other securities for the other persons, alleged a direct discount or purchase of the notes and mortgages by the bank directly from Mr. Anderson as a direct contract between principals, and alleged that the transaction was so understood by both parties, notwithstanding the technical legal construction placed upon certain expressions in the letters of the cashier, Mr. Titus. (See answer, pages 4, 5, 6 and 7.)

The facts established by the pleadings and evidence, and confirmed in the opinions of the State Supreme Court are that there was no actual conversion of the notes or mortgage or any of them, there was no disposition; destruction, concealment or unauthorized act of ownership. They had been duly indorsed, assigned and transferred to the bank April 6, 1891, as collateral security (page 2) and thereafter remained rightfully in the possession of the bank regardless of subsequent transactions, agency or sale. There was no change of possession, location or conditions of the paper except a rightful payment and cancellation of part of the notes, on or after maturity. There was no tender to the bank of the $2,000 loan, nor of the $4,397.48 remitted. Nor was there any de-
4 mand by Anderson for the paper or claim of the right to rescind the purchase by the bank. (Page 29.) Mr. Anderson's position was not changed by the transaction of October 7th, 1891, if there was such agency unless he saw fit to ratify the purchase by the bank, which he did by demanding the pretended balance and sueing for it in this form of action. (Page 3.)

These facts are important in the determination of the federal questions involved herein, for a national bank may be liable for an actual conversion and disposition of personal property, where it would not be liable for a technical violation of a contract to act as agent, which is ultra vires, either as the act of the cashier or the contract of the bank itself.

Evidence properly tendered on behalf of the bank by questions, and stated offers of evidence, and excluded, but preserved as parts of the record, and wholly uncontradicted, shows: That both parties considered the purchase or discount of the notes a direct contract between the bank and Mr. Anderson as principals. Pages 25, 26, 27, 28 and 29.) That Mr. Anderson never considered or relied upon the bank as his agent. That he stated after the commencement of this action that he always denied such agency, and claimed he had never written authorizing S. S. Titus, the cashier,

or the bank to act as his agent in any manner. (Pages 25, 26, 27 and 28.) Also, that two or three times prior to the commencement of this action Henry W. Phelps, attorney for the defendant in error, Anderson, and a member of the firm of Phelps and Phelps, then his attorneys in this matter, had conversation with S. S. Titus, the cashier, at the First National Bank in regard to the notes and transactions in controversy, in which Mr. Phelps acted on behalf of Mr. Anderson, in which conversations Mr. Phelps was told by Mr. Titus that the bank still owned the paper, and that Mr. Anderson, through his attorneys, had notice and knew that the paper was still in the possession and control of the bank as owner, and that instead of rescinding or demanding the paper he demanded the pretended balance of the purchase price. (Pages 26 and 27.) And evidence was introduced that H. W. Phelps as such attorney did demand the money instead of the paper or a rescission of the contract. (Page 26.)

Also: That thereafter on December 1st, 1892, prior to the commencement of this action, J. D. Phelps, the other member of Phelps & Phelps, Anderson's attorneys, knew that the notes were
5 still held by the bank and personally paid one of them to the bank by his check and had it sent to him. (Page 27.)

Also: That S. S. Titus had no authority other than his implied authority as cashier of a national bank, to bind his bank by contract or otherwise. That the board of directors of this bank never took any action upon, or in any manner constituted or authorized the bank, or Mr. Titus in its behalf, to be, or to act as, or assume the duties of an agent for Mr. Anderson for the sale of the notes and mortgage. (Page 30.)

Also: That the actual value of the notes and mortgage, October 7th, 1891, did not exceed $6,000.00. (Pages 30 and 31.)

Also: An explanation of the reference to third parties in the telegram of August 31st, and the letters of September 3d and 14th, 1891, that one R. M. Sherman, of Spokane, Washington, secretary of the Vermont Loan & Trust Company, was at Grand Forks in August and again in October, and offered to take the paper from the bank if it could obtain Anderson's interest in it, but that after the bank had obtained, or attempted to and supposed it had obtained such interest, Sherman declined to take the papers unless guaranteed by the bank, which the bank refused to do, and the paper was left in the bank's hands. (Pages 29 and 30.) The foregoing tenders of evidence were all excluded.

The letters and telegrams constituting the alleged contract of agency are so important as to justify a full abstract of them in this statement, and are here presented in chronological order.

August 11th, 1891, the notes and mortgage then being in the possession of the bank, the notes duly indorsed, (page 2), and the mortgage and notes, duly assigned in writing, constituting a conveyance thereof, and of the legal title thereto, to the bank, absolute in form, (page 2), but in fact as collateral security for Anderson's debt of $2,000.00; he wrote. "Exhibit 1." "Seattle, Wash., Aug. 11, 1891. Mr. S. S. Titus, Grand Forks, N. D. Dear

Sir: Any time you feel like buying those notes of mine let me hear from you. Alex. Anderson." (Page 17).

Answered, August 17th, 1891. "Exhibit 4," (page 18). "Alexander Anderson, Seattle, Washington: Your favor of the 11th received. The offer coming from you, you have neglected
6 to say what you will take for the paper. . . . . We may take the paper from you if it can be had at a discount that will warrant us in accepting it, but until we hear from you again we can give no definite answer. You will have to make a very liberal offer before we will take even the time, or go to the expense of looking it up. S. S. Titus, Cashier."

"Exhibit7," a letter, (page 18). "Seattle, Wash., Aug. 27, 1891. S. S. Titus, Grand Forks, N. D.: Dear Sir: Your letter of the 17th is to hand regarding notes. . . . . I would be satisfied to give a discount of five per cent. on face. Very respectfully. Alexander Anderson."

"Exhibit 8," memorandum of a telegram sent to Mr. Anderson by Mr. Titus regarding these notes and mortgage (page 19). "Wired him. If accepted now, a party is here, so we can send you $4,000.00 together with your note. You to make the title good if anything comes up. Answer by wire at once. Aug. 31, '91. 1st Nat. Bk."

"Exhibit 9," a letter, (page 19). Grand Forks, N. D., Sept. 3, 1891. Alexander Anderson, Seattle, Wash.: August 31 we wired you. 'If accepted now, a party is here, so we can send you $4,000.00 together with your note. You to make title good if anything comes up. Answer by wire at once.' We overlooked confirming the same the same day. As yet we have received no reply and came to the conclusion that you do not wish to sell the paper. Money is very close here now and is going to be all over the northwest, no matter how large the crop is. S. S. Titus, Cashier."

"Exhibit 10," a letter, (page 19). "Seattle, Wash., Sept. 8th, 1891. S. S. Titus. Dear Sir: Yours of the 3d inst. is at hand. I do not wish to sell the notes for the figures you offer. If you send $4,000.00 and note, balance some other time, it is all O. K. I wrote you saying I would give a discount of five per cent. on face of notes. Yours respectfully. Alexander Anderson."

"Exhibit 11," a letter, also identified as Exhibit E," of the personal deposition of Alexander Anderson taken at Seattle,
7 Washington, May 29th, 1893, (pages 15 and 19). "Grand Forks, September 14th, 1891. Mr. Alex. Anderson, Seattle, Wash. Dear Sir: We never make a trade in the way you mention, that is, pay a part and later on send or pay more; we, if we make a trade with any one, always close it up at once, then it is complete and out of the way. If I had a basis to work on, I might find some one who would take the paper. You offered it at $350.00 discount; we offered you a trade at $1,000.00 discount; now if you will make it $700 or $800 and allow us a small commission, I will try and place the paper for you. You as I wrote you to make the title clear and straight if anything should come up in the deal. . . . . If you care to have us go to work on these terms, you write or wire me. Yours, S. S. Titus, Cr."

"Exhibit "A" of Anderson's personal deposition, being the same

as "Exhibit 13" of Titus' testimony, was a paper purporting to be the receiver's copy of a telegram, claimed to have been received by Mr. Anderson at Seattle, Washington, but not connected with the bank or any of its officers, and concerning which S. S. Titus testified repeatedly he had no knowledge, except that he had seen and copied it on the back of a telegram of later date after the commencement of this action, and had no recollection of ever having sent or seen the telegram or any such telegram prior to the commencement of this action, nor of sending any telegram to Mr. Anderson on or about that date, (see pages 20, 21 and 22) was as follows: "Received at Seattle, Wash., Oct. 3, 1891. Alex. Anderson, Seattle: Did you receive our letter September 14th. Wire us you best offer, so we can advise a party who said he would hold his money until we heard from you. First National Bank." (Page 12.)

"Exhibit B" of Anderson's deposition, copy of telegram, also set out in the amended complaint and answer, and being "Exhibit 12" of Titus' testimony (pages 5, 13 and 20). "Seattle, Washington, Oct. 5, 1891. First National Bank, Grand Forks, N. Dak. Will give discount of five hundred dollars. Alex. Anderson."

"Exhibit C" of Anderson's deposition (pages 5, 13 and 22).

8 "Grand Forks, N. D., Oct. 7, '91. Mr. Alex. Anderson, Seattle, Wash. Dear Sir: Your wire of Oct. 5 to hand.

Discount	$ 500.00
Half per cent. commission for selling the paper	35.00
Release and record of $80 mortgage given Gates	2.00
Record of Assignment	1.50
1890 Taxes you stipulated to pay	47.02
Attorney to examine abstract	5.00
Continuing abstract	4.50
Exchange on New York	7.50
Draft for balance	4,397.48
	$7,000.00

Returns for J. A. Wilson seven notes. In my judgment this is a good trade for you. Yours. S. S. Titus, Cr."

"Exhibit D" of Anderson's deposition (pages 6 and 14). "Seattle, Washington, Oct. 13, 1891. First National Bank, Grand Forks, N. Dak. Gentlemen: Your letter with enclosed draft for $4,397.48 and note of $2,000.00 is at hand, which I cannot accept. I wired you I would give a discount of five hundred dollars, and you make a discount of about $1,175. I did not agree to pay any other expenses. Those notes call for $7,000.00 and $630.00 interest. I shall expect balance of money by return mail. Yours respectfully. Alex. Anderson."

Mr. Titus also testified that the notes were entered in the bank's record of bills receivable as of the date October 7th, 1891. (page 17) and that he purchased the notes from Alexander Anderson personally. The exact form of the question and answer being "Question by Mr. Phelps. 'From whom did you purchase these notes, Mr. Titus, the person?. Answer. 'Alexander Anderson.'" (Page 23).

The foregoing letters constitute all the correspondence between the parties in relation to the sale of the notes, and all the evidence of the contract of agency, if any, and the terms of such agency. They with the testimony of Mr. Titus were each offered in evidence and introduced by and on behalf of Mr. Anderson by his attorney and against the objections of the bank interposed, to each of such letters and telegrams. The elipses indicated in Exhibits 4, 7 and 11 (E) being the letters of August 17, 1891, August 27,
9 1891, and September 14, 1891, consisted merely of opinions as to the probable condition of the money market and the security of the notes. And this correspondence with the tenders of evidence on behalf of the bank and testimony of Mr. Titus disclose the entire transaction.

The original dispute between the parties was as to price to be received by Mr. Anderson for the notes. He claimed, and we presume honestly, that he should receive $7,130.00, including his note for $2,000.00, being $7,000.00 principal and $630.00 accrued interest, less $500.00 discount. (See his letter of October 13th, 1891, pages 6 and 14). While in view of the entire correspondence, especially Mr. Anderson's letters of August 27th (page 18) and Sept. 8th (page 19) in each of which he offers to discount the notes "Five per cent. on the face of the notes," in other words, to take $6,650, being the face of the notes, $7,000.00, less five per cent., $350.00, and also Mr. Titus' letter of September 14th, 1891, (page 15), which informed Mr. Anderson of the bank's understanding of his offers, which letters referred to the above offers, and the bank's offers in the telegram of August 31st, (page 19), and letter of September 3d (page 19) to send him $4,000.00 and his note, $6,000.00 in all, being a discount of $1,000.00 from the principal of $7,000.00 The letter of Sept. 14 containing this statement: "You offered it (the paper) at $350 discount; we offered you to trade at $1,000." Mr. Titus believed that the telegram of Oct. 5th: "Will give discount of $500.00" was simply an increase of the discount from $350.00 to $500.00, or a reduction of the price from $6,650.00 to $6,500.00, and also believed that the correspondence contemplated that Mr. Anderson should pay necessary expenses of clearing up the title.

This dispute placed the correspondence in the hands of Mr. Anderson's attorneys, who evidently relying upon the agency and commission by the letter of October 7th, brought the action in this form without any attempt to rescind or demand for the paper.

There were four trials in the District Court, the last on February 2d and 3d, 1897, on which trial the court directed a verdict against the bank. Motion for new trial was denied May 14th, 1897, and judgment rendered on the verdict against the bank June 3d, 1897, for $1,914.70, from which it appealed to the State Supreme Court, which decided against the bank, denied a petition for rehearing, and rendered judgment against the bank for the full amount and costs of the appeal, and the bank having exhausted every remedy in the court of last resort of the State of North Dakota,
10 brings the cause to this court on writ of error for an examination of the federal questions raised in the state courts

and decided against the bank; especially an immunity claimed by it under the statutes of the United States, and which was denied by both the District and Supreme Courts of North Dakota. The specific federal questions involved and the record of the manner in which they arose appear in the specifications following and the parts of the record cited therein.

SPECIFICATION OF ERRORS.

Plaintiff in Error, The First National Bank of Grand Forks, North Dakota, and the defendant and appellant in the District and Supreme Courts of North Dakota, as a part of this, its brief, makes the following specifications of errors which it avers occurred upon the trial of this action in said State Supreme Court, and on which it will rely upon the further proceedings in this action.

Plaintiff in Error relies upon the several errors assigned and set out in its assignment of erros annexed to and presented with its petition for a writ of error in this case (see printed record, pages 47 to 52 inclusive) and which by reference was pointed out and referred to as its statement of errors in the stipulated record. (See printed record, page 52) and which are herein specifically set out as follows:

I.

The Supreme Court of North Dakota erred in denying appellant's, this plaintiff in error's, assignment of errors, committed by the District Court of that State upon the trial of this cause in such District Court, in the admission of defendant in error's evidence, and wherein the State Supreme Court erroniously ruled and adjudged that the District Court did not err in admitting such evidence in the following instances:

(1.) In assignment of error number one (1), (printed record, pages 11, 32, 35 and 48), that the district court erred in overruling and denying plaintiff in error's objection made at the first offer of evidence in behalf of defendant in
11 error, wherein plaintiff in error objected to the introduction of any evidence on behalf of defendant in error, for the reason that the complaint does not state facts sufficient to constitute a cause of action, "which objection was overruled by the district court, and exceptions to such rulings were duly taken, allowed and preserved, and which ruling was affirmed by this, the Supreme Court of North Dakota. The complaint stating a pretended cause of action, which on the face thereof was based upon a pretended contract on the part of the defendant bank, this plaintiff in error, which by the statutes of the United States was not within the power of a national bank to make, and upon the face thereof was ultra vires and void.

(2.) In assignment of erros number fifty (50), (pages 10, 15, 32, 33, 35 and 48), that the district court erred in overruling and denying defendant, plaintiff in error's, objection to Exhibit "E," the letter dated Grand Forks, September 14th, 1891, addresed to Mr. Alexander Anderson, Seattle, Wash., and signed S. S. Titus, Cr., wherein is contained the pretended offer to act as agent in the fol-

lowing words: "If I had a basis to work on I might find some one who would take the paper. You offered it at $350.00 discount; we offered you a trade at $1,000.00 discount. Now if you will make it $700.00 or $800.00 and allow us a small commission, I will try and place the paper for you." Which ruling by the district court was affirmed by this, the Supreme Court of North Dakota, although the contract sought to be established thereby was one which under the National Bank act, a statute of the United States, was not within the powers of a national bank to make, or to perform, and was ultra vires and void, and under such statute it was not within the powers of a cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgages to third persons, and the act of the cashier in writing such letter was ultra vires and void.

(3.) In assignment of errors number seventy-four (74), (pages 19, 20, 32, 35 and 48), concerning like objections to the introduction in evidence of the same letter as Exhibit Eleven (11) upon identification thereof by the witness, S. S. Titus.

(4.) In assignment of error number ninety (90), (pages 26, 31, 32, 35, 48 and 49), wherein the district court erred in overruling and denying defendant's, plaintiff in error's, motion to strike
12 out the letter of September 14th, 1891, being Exhibit "E," and also identified as Exhibit "11" as above stated, on the ground that it was ultra vires and also not shown to have been the act of the bank, which erroneous ruling was affirmed by the supreme court of North Dakota, althouh the contract of agency held by such court to be established thereby was as the contract of a national bank ultra vires under the National Bank Act, and the act of the cashier in undertaking to bind his bank by such contract was ultra vires under said act.

(5.) In assignment of errors number one hundred and forty-seven (147), (pages 33, 35 and 49), concerning the admission of said letter, Exhibit "E," admitted over defendant's objections and the admission adjudged to be proper by the Supreme Court of North Dakota.

(6.) In assignment of errors number one hundred and forty-five (145), (pages 32, 35 and 49), wherein defendant, plaintiff in error, assigned error in admitting evidence of the pretended telegram of October 3d, 1891, as follows: "Did you receive our letter September 14. Wire us your best offer so we can advise a party who said he would hold his money until we heard from you. First National Bank." Upon the ground that there was no evidence of the identity or authority of the writer or sender, if any, and the agency, if established, was ultra vires, and the act of any officer contracting that the bank would act as agent would be ultra vires, which express claim for immunity against liability both on account of ultra vires acts of the cashier, and also on account of ultra vires contracts by the bank itself was by the Supreme Court of North Dakota erroniously denied.

II.

The court erred in denying defendant's, plaintiff in error's, assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the rejection of evidence offered by the defendant, plaintiff in error, which erronious rulings were affirmed and sustained by the supreme court of North Dakota, which court erroneously denied defendant, plaintiff in error, a reversal of the judgment of said district court, and erroniously affirmed said judgment against it in said action, notwithstanding such errors by the court below, and that the said erroneous rejection of evidence was in the following instances, to-wit:

(1.) In assignment of error number one hundred and twenty-three (123), (pages 30, 32, 33, 35, 49 and 50), wherein J. Walker Smith, president of the board of directors of the defendant
13 bank, this plaintiff in error, was produced, sworn and examined as a witness on its behalf, and shown competent to testify to the facts, and was asked: "Did the board of directors of the defendant bank in any way ever authorize Mr. Titus to act for and on behalf of the bank constituting the bank thereby the agent of the plaintiff for the sale of the notes in litigation?" which question was objected to by the plaintiff, this defendant in eror, on the ground that it was incompetent, irrelevant and immaterial, which objection was erroniously sustained by the district court, and exceptions to such rulings were duly taken, allowed and preserved, and duly submitted to the supreme court of North Dakota, wherein such rulings were erroneously affirmed and judgment rendered against plaintiff in error, notwithstanding such error, though under the statutes of the United States, the cashier, Titus, could not render plaintiff in error liable as agent by his acts without such express authority, and any act on the part of such cashier attempting to contract for or on behalf of the bank that it would assume or undertake any of the duties, obligations or liabilities of an agent for the sale of said notes to the third parties, if established, was ultra vires and void.

(2.) In assignment of errors number one hundred and twenty-four (124), (pages 30, 32, 33, 35 and 50), wherein plaintiff in error offered to prove by said witness, J. Walker Smith, that the defendant bank did not in any way, either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the defendant bank, constituting the bank the agent of the plaintiff, defendant in error, for the sale of the seven promissory notes in litigation, which evidence the district court erroneously excluded upon the objection that it was irrelevant, incompetent and immaterial, to which ruling exceptions were duly taken, allowed and preserved, and duly submitted to the supreme court of North Dakota, wherein said ruling was erroneously affirmed, and judgment has been erroneously rendered and entered against plaintiff in error, notwithstanding such error, although it manifestly appeared that such ruling was in conflict with the statutes of the United States, and denied to defendant a right, privilege

and immunity claimed by defendant under such statutes that it should not be liable for ultra vires acts of its cashier.

(3.) In assignment of errors number one hundred and twenty-five (125), pages 30, 32, 35 and 50), wherein plaintiff in error offered to prove by said witness, J. Walker Smith, that its board of directors never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, the agent of Alexander
14 Anderson for the sale of the seven promissory notes, which evidence was erroneously excluded by the district court upon the same objections and such ruling, duly presented and submitted in the supreme court of North Dakota was erroneously affirmed and judgment erroniously entered, though such ruling erroneously denied a right, privilege and immunity expressly claimed by plaintiff in error under the National Bank act, a statute of the United States.

(4.) In assignment of error number one hundred and fifty-four (154), (pages 33, 35, and 50), wherein plaintiff in error assigned as error that the district court erred in excluding the testimony of J. Walker Smith that no authority was conferred upon any officer to, nor was any steps taken whereby the bank could engage to act as agent for the sale of these notes, or otherwise, such facts being material relevant and competent, because any contract to that effect is ultra vires, and not within the implied or customary powers of officers of national banks, which claim for immunity from ultra vires acts of officers and from liability on account of ultra vires contracts by national banks themselves thus expressly set up was erroneously denied by the supreme court of North Dakota.

(5.) In asignments of errors numbers eighty-six (86), one hundred (100), and one hundred and one (101), (pages 25, 26, 27, 28, 32 and 35), wherein plaintiff in error assigned as error that the district court erred in excluding the testimony of the witness, S. S. Titus, both on cross examination against, and on direct examination as witness for the bank, that the conversation witness had with Alexander Anderson, defendant in error, in December, 1895, after the third trial, at Seattle, Washington, was in regard to this case and the transactions out of which it arose, that in such conversation Mr. Anderson made certain admissions, and what that conversation was. Also in excluding the offers of plaintiff in error to prove by such witness, that at such conversation Mr. Anderson admitted to witness that he, Anderson, "Never considered plaintiff in error as his agent. That he denied the agency and refused to allow $35.00 commission and had never written authorizing Titus or the bank to act as his agent in the matter in any manner." All of which testimony and proof was competent and material not only on the question of the fact of a contract of agency but also on the question whether plaintiff in error can raise the question of ultra vires in such contract, or in other words, whether the alleged conversion was an actual conversion of the property or a mere technical violation of a written contract of agency which was not understood by the parties to be such.

(6.) In assignment of errors number eighty-eight (88), (page 26), ninety-seven (97), (pages 26 and 27), and ninety-eight (98), page (27),

wherein plaintiff in error assigned as errors, that after the witness S. S. Titus, testified "I am acquainted with Mr. H. W.
15 Phelps, the gentleman sitting there, attorney for plaintiff. I had a conversation with him prior to the commencement of this action in reference to these notes at the First National Bank. He was in two or three times to see me about the paper. He made a demand on me for the money in connection with this same matter." (Pages 26 and 27.) The district court erroneously excluded the testimony of the witness as to what the conversations were; that defendant in error prior to the commencement of the action through his attorneys had notice and knew that the bank held and claimed to own the paper, and therefore, if his present contention as to agency be correct defendant in error could have tendered back the remittances of October 7th, 1891, and demanded the notes and mortgage. Also erroneously excluded the offers of plaintiff in error to prove by this witness that at the times he had the conversation with Mr. Phelps and when this subject was under discussion. He, Mr. Phelps, was acting for and on behalf of Mr. Anderson, defendant in error, in this action; that the witness then stated to him that the bank was the owner of the paper, the subject matter of the action. All of which testimony and proof was competent, relevant and material, not as a declaration of ownership in its own interest, but as evidence that defendant in error had due notice before bringing the action that the notes were within the control of the bank and he had due opportunity to rescind by tender and demand, which he did not do but demanded an alleged balance of money instead. Which is proper evidence that there was no actual conversion, but at most a technical violation of an executory contract of agency, which plaintiff in error claimed was ultra vires.

III.

The supreme court of North Dakota erred in denying to defendant, plaintiff in error, the immunity conferred upon it as a national bank by the statutes of the United States, that it should not be liable on account of ultra vires acts of its cashier, and not even by ultra vires contracts by the bank itself, which immunity was expressly claimed by defendant in the district court wherein the case was tried, and in the supreme court of said state when brought there upon appeal in each of the foregoing instances, and in the following instances, to-wit:

(1.) In assignments of errors number one hundred and fifty-six (156), (pages 32, 35 and 51), wherein defendant, plaintiff in error, assigned as error that the district court erred in directing a verdict for defendant in error for the amount directed, or for any amount, which ruling was affirmed by the supreme court of
16 North Dakota, although the verdict was based upon a complaint which set up a cause of action solely upon an ultra vires contract, and was supported, if at all, only by evidence of such ultra vires contract, made by the defendant's cashier without authority.

(2.) In assignment of errors numbered third (III), (pages 35 and

51), of the assignments of errors annexed to and written out at length at the close of its brief, in such state supreme court, wherein plaintiff in error assigned error as follows: "Appellant" (this plaintiff in error) "further says there was manifest error" (by the district court) "in rendering judgment against it in this action for each of the foregoing reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the United States to national banks against liability on account of ultra vires acts of their officers and ultra vires contracts of the banks themselves." Which erroneous judgment was erroneously affirmed by the supreme court of North Dakota, notwithstanding such claim and right to immunity under said statutes of the United States.

IV.

The supreme court of North Dakota manifestly erred in denying to plaintiff in error, by giving judgment against it, the immunity claimed and set up by it under the statutes of the United States against liability on account of ultra vires acts of its cashier, and ultra vires contracts by the bank itself, whereon alone judgment was demanded and rendered. (Page 51.)

V.

The supreme court of North Dakota erred in denying defendant's, plaintiff in error's, petition for a rehearing upon the ground that such court had overlooked and disregarded the record and the law applicable thereto in relation to the want of power of authority of the cashier of a national bank to bind his bank by contract to assume the duties and responsibilities of an agent to sell notes and mortgage for defendant in error to a third person. Also that said supreme court overlooked and disregarded the record and the law applicable thereto in relation to the power of a national bank itself in any manner by contract to assume the duties and responsibilities of such agent, and has thereby denied plaintiff in error a right, privilege and immunity claimed by it under the statutes of the United States. (Pages 51 and 52.)

ARGUMENT.

The record in this case is unnecessarily long, a condition for which plaintiff in error is not entirely if at all to blame,
17 a great part having been presented by defendant in error. Most of the facts, evidence and proceedings are important only as showing whether the federal questions presented are necessarily involved in the merits of the action.

I.

Plaintiff in error submits that the federal questions presented herein were necessarily involved in the merits of this action from its commencement, and in all the proceedings therein, in the district and supreme courts of North Dakota. That a determination of such federal questions were necessarily involved in the decision and judgment of the state supreme court, without which such

decisions could not have been arrived at or such judgment rendered.

The questions presented in this brief were each raised and decided in the state, district, and supreme courts, in proper form and manner. And there was no independent ground, not involving such federal questions, on which the decision and judgment of the state court could be, or was in fact predicated.

Plaintiff in error submitted a short brief on the necessity for a determination of the federal questions, and the right of the bank to claim immunity from liability under federal statutes, in January, 1898, upon motion to dismiss writ of error, to which it respectfully refers the court on this point.

The primary questions presented are:

First: Is it within the power of a national bank to engage in the business of selling mortgage notes on commission?

Second: Is it within the implied powers of a cashier of a national bank to bind his bank by contract to assume the duties and liabilities of an agent for the sale of notes and mortgages to third persons?

Other and secondary questions arise which are federal questions because their determination establishes or tends to establish the existence of the above primary questions as necessary elements of the judgment and support the claim of the bank for immunity, under federal statutes, against liability on account of ultra vires acts of its officers and ultra vires contracts of the bank itself, if any.

II.

The powers of the bank itself, under the National Bank act, to engage in the sale of mortgage notes on commission is directly and necessarily involved in the merits, and in the determination of this case.

A contract of agency for the sale of the notes and mortgage is the primary element in the allegation of a wrongful conversion in the amended complaint (paragraphs V. and VI., page 2) and the second element of such conversion, the alleged sale of the
18 notes by the bank itself is claimed to be wrongful only because of such contract. "And the defendant wrongfully and in violation of its duty as plaintiff's agent for the sale of said seven promissory notes converted said notes to its own use, and sold the same to itself."

There is no claim or pretense of any conversion, either in the pleadings, the evidence, or in the opinion of the state supreme court, other than the so-called sale of the notes by the bank to itself.

In the opinion of the supreme court of North Dakota the fact of such contract of agency is treated as of the utmost importance (pages 36 and 42) and the fact of conversion was therein based wholly on such contract and the so-called sale by the bank to itself. (Pages 42 and 43.)

The agency therein referred to deserves special consideration. It was wholly the creation of express contract. It was an agency.

or a contract of agency in law by a judicial construction of the correspondence which excluded the actual understanding of the transaction by the parties. (Page 42.) There was no allegation in the amended complaint of any actual agency, or the exercise of the powers of an agent, but only of two specific telegrams which if proved would establish a contract of agency. (Page 2.)

The so-called sale of the notes by the bank to itself also needs consideration. It is undisputed that October 7th, 1891, the bank attempted to purchase, supposed it had purchased, and has ever since claimed it did purchase the notes from Mr. Anderson. It is also undisputed that the only act of the bank, or of any one for the bank in the transaction of the so-called sale to itself, was that Mr. Titus as cashier for the bank wrote the letter of October 7th with the remittance of $6,397.48 to Mr. Anderson and entered the notes in the bank's register of bills receivable.

The bank claimed the transaction was a purchase from Mr. Anderson directly without the intervention of any agency, and that it was so understood and intended by both parties. The defendant in error by his attorneys claimed (pages 26 and 28) and the supreme court of North Dakota decided (page 42) that the intent and understanding of the parties was immaterial, irrelevant and incompetent because the letters and telegrams in evidence constituted, in law, a written contract of agency, the construction of which was for the court alone.

The bank denied that it sold the notes to itself, and it never claimed any title or interest under or by virtue of any agency; but the theory of Mr. Anderson's attorneys and of the state supreme court is that the bank must have, and in law did sell the notes to itself because of such contract, and the act of writing the letter of October 7th, 1891. (Pages 42 and 43.)

The bank denied any conversion. But the theory of the attorneys for the defendant in error, and the opinion of the state
19 court was that the bank must have, and in law, did convert the notes, because there was, in law, such written contract which with the letter and remittance of Oct. 7 constituted in law a sale of the notes by the bank to itself, which in turn constituted, in law, a tortious conversion regardless of the understanding or intent of the parties (pages 26, 28, 12 and 43). We believe this theory and decmision is entirely erroneous, and would be so even if the plaintiff in error had been a natural person instead of a national bank; but right or wrong it is a decision every step of which rests finally upon the legal effect of the letters and telegrams as constituting a binding contract that the bank would assume, and did by such contract, not otherwise, assume the duties and liabilities of Mr. Anderson's agent to sell the notes and mortgage for him to third persons.

The theory of defendant in error as disclosed by his brief on motion to dismiss, is that the decision of the state supreme court is final upon every question except the two primary ones, whether the pretended contract of agency was ultra vires either as an act of the cashier or as a contract by the bank itself; and therefore its decision that the question of ultra vires was immaterial, and that

the evidence conclusively showed a contract of agency, a sale by the bank to itself, and a tortious conversion of the notes is final and disposes of the case.

It is certain, however, that the final decision, whether the federal questions are material and necessarily involved in the action, is for this court and not the state court. It is equally certain that every preliminary and collateral fact which establishes or tends to establish the materiality of such federal questions, and the necessity of a determination of them may be considered by this court.

If the conversion were actual and not dependent upon the pretended contract of agency, or if there had been an actual sale of the notes by the bank as agent to itself as purchaser with a claim of title or interest under such sale, then a decision by the state supreme court that there had been such actual conversion, or such actual sale might be final as not involving any federal question. But when all the elements of the so-called conversion and sale are set out, one of which, and a necessary one, is the pretended contract of agency which does involve a federal question, this court will go back of the so-called conversion and sale to the contract and decide the federal question.

It is true the learned chief justice of the state supreme court said in the opinion (page 43) that that court deemed the question of ultra vires immaterial. On that point the opinion of the supreme court does not govern. The statement is inconsistent with the essential features of the opinion, is totally unsupported by the record and is illogical. He says there was a contract of agency for the letters and telegrams, in law, constituted one. There was an agency, for the contract, in law, constituted one. There was a prohibition against a purchase of the notes by the bank, because the agency, in law, constituted one. There was a tortious conversion of the notes because the prohibition and the admitted purchase, in law, constituted one, and then abandoning the premises he says, since there was a conversion which is a tort it is immaterial whether there was a contract or not. Having arrived at his conclusion he says his premises are immaterial.

We do not claim that a national bank may not be liable for the wrongful conversion of personal property. Nor do we claim that a national bank can escape liability for an actual conversion of personal property because it obtained possession under a contract which was ultra vires. We assume that if a national bank as pledgee, agent, factor or bailee of any kind have possession of the property of another, and then without authority use, alter, transfer or dispose of it, or wrongfully retain possession after proper demand and tender by the owner, or if it deceive the owner and prevent such demand and tender, or if in any unauthorized manner it deprive the owner of any use, possession or right in the property such unauthorized act would constitute a tortious conversion, whether the contract or bailment were ultra vires or not. Indeed the original action of trover was based upon an actual or alleged finding of the property, and not upon any contract. And the tort consisted in the subsequent unauthorized appropriation of the

property to the use of the finder to the exclusion of the owner's rights.

We do claim that when the so-called conversion is based primarily upon an alleged contract of agency without which it is not pretended there would be any conversion, then such contract must be a valid contract within the power of the alleged wrong doer to make.

It was error to predicate a tortious conversion upon the so-called agency, the correspondence and all the acts of the bank and its cashier; and it would have been error even if done by a natural person instead of a national bank. The bank was rightfully in possession of the notes and mortgage as pledgee at all times after April, 1891, without using or changing their condition or denying to Mr. Anderson any possession, use or right in them. It is not pretended that Mr. Anderson demanded the notes or tendered the $6,397.48 advanced on them or the $2,000.00 loan, for which they were pledged. It is not pretended that Mr. Anderson and his attorneys did not know all the facts of the transaction, or that
21 he was in any manner prevented from demanding the notes and tendering the advances. On the contrary his amended complaint expressly avers the purchase by the bank and a demand for the difference in money instead of for the notes. It is not pretended, except by an allegation in the pleadings unsupported by any evidence, that he relied upon or considered the bank as his agent in the matter and the exclusion of the testimony of Mr. Titus (pages 26 to 28) of Mr. Anderson's personal admissions that he, Mr. Anderson, had never considered the bank his agent excludes from consideration any pretense of reliance or trust.

But erroneous or not the decision would be final except as it involves federal questions. It is important, however, to consider these collateral facts as exactly defining the kind of conversion relied on in this case as one which rests primarily upon a contract. It is that kind of a conversion or none.

Again, the decisions of the state supreme court that the contract was a contract of agency, the sale therefore, a sale by the bank to itself, and the transaction therefore a wrongful conversion, since each confessedly rests primarily upon the letters and telegrams of the cashier as a contract agency, amount only to so many names or labels for the correspondence and acts of the cashier and upon that correspondence and such acts as within or beyond the powers of the cashier of, or within or beyond the corporate powers of national banks themselves, the questions in this court plainly rest. The state court labels of "agency" and "conversion" do not in this case forbid an examination of the record behind them.

Another reason why the federal questions are necessarily involved in the merits of the action is that the action is on a contract and not in tort. Defendant in error with full knowledge of all the facts expressly waived the tort, if any, and elected to sue on contract. The exact language of his amended complaint is (page 3). "The plaintiff now elects to waive the wrongful element in the

sale by the defendant to itself hereinbefore mentioned for the purpose of maintaining this action as a suit in assumpsit, etc."

Under the authorities this waiver constituted a ratification of the act of the bank and of its cashier. This waiver of the wrongful element in the sale of the notes by the bank to itself, if any, ratified that sale, and ratified it according to its terms. The ratification in part ratified all..

The state supreme court erroneously held that this waiver and election ratified nothing. That waiving the wrongful element in the sale did not ratify such sale. This decision, notwithstanding the error, is final, as it does not in itself involve any fed-
22 eral question; but the waiver and election demonstrate that the action is on a contract which involves a federal question. It became and is a direct suit to enforce the express and implied terms of the alleged contract of agency.

Plaintiff in error does not claim that it could hold the notes under a contract of agency, or a purchase through such agency, and at the same time repudiate such agency or contract as ultra vires. It has never claimed title or possession under any agency.

Neither does it, in this court, claim that it could have held the notes against a proper demand for them with tender of advances thereon, under a claim of title by direct purchase from M. Anderson, for the state courts have in effect held that there was no direct purchase.

While the bank in its answer did allege such direct purchase, it was after the title, in any event, had vested in the bank by the act of the defendant in error himself, in waiving the tort and electing to sue on contract, and not against any claim for the use, possession or title to the notes.

III.

The question of the implied power of the cashier of a national bank to bind such bank by contract to engage in the business of selling mortgage notes on commission, and to assume the duties of such an agency is a federal question and is necessarily involved in the merits of this action independent of the corporate power of the bank itself.

It is undisputed that this action is based on a contract of that kind, and also undisputed that all acts and correspondence on the part of the bank was done by the cashier alone without other than the implied and customary powers of cashiers of such banks.

It is true the state supreme court held that the bank could not raise this question. In the opinion (page 43) Corliss, Chief Justice, says: "What we said in our opinion on the third appeal on the sub-"ject of the authority of the cashier to bind the defendant by creat-"ing the relation of principal and agent between plaintiff and de-"fendant is still applicable to the case on the record now before us. "In its answer and the brief of its counsel the defendant admits "that the writing of the letters referred to was its act and not the "act of an unauthorized agent. By its own pleading and admis-"sion it has precluded itself from raising the point that the cashier "had no power to bind it by agreeing that the bank would act as "agent for the plaintiff."

The decision of the State Supreme Court on this question is not final, and it is not supported by the record. The memory of the learned Chief Justice was at fault. The brief of plaintiff in error in that court did not contain any such admissions, but on the contrary, so strenuously denied such authority, that that
23 court deemed it necessary upon two appeals to decide or otherwise dispose of the question. Such admission, if made, would have been a proper part of the record on this writ of error and should have been included, while the entire brief was not a proper part of the record to show what it did not contain.

The answer which is part of the record contains no such admissions. The answer (Paragraph VI, Page 5) "Admits that defendant received said telegram from plaintiff and that defendant wrote plaintiff as follows," setting out the letter of October 7th in full, signed "S. S. Titus, Cr.," and (Paragraph IX, Page 6) alleged that prior to October 5th, 1891, by and in certain letters and telegrams Anderson offered to sell the notes to the bank at certain discounts, and the bank offered to buy at other and greater discounts. There is no reference to any letter or telegram constituting or held to constitute a contract of agency, and especially denied the alleged telegram of October 3rd.

These expressions, that the bank wrote the letter and made the remittance of October 7th, 1891, and that prior to October 5th, 1891, the bank offered to purchase the notes at certain discounts if standing alone and unexplained would amount to no more than a formal admission that those particular acts were the acts of the bank, insofar as any officer, or possibly all of the officers of the bank, could make them its acts, for being a corporation and not a natural person, no admission could amount to more than an admission that the officers of the bank did the acts; but coupled with an express statement of the facts and a copy of the letter showing it was written by the cashier, the statement amounts to no more than that the letter was written by the cashier.

This letter and the offers to purchase constituted no part of the pretended contract or agency, which as set out in the amended complaint consisted of the two telegrams of October 3rd and October 5th, and has hed by the state supreme court, of the letter of September 14th and the telegram of October 5th.

Construeing the answer as a whole, it amounts to a statement and admission that by and in certain letters and telegrams, the bank acting by and through its cashier, discounted or purchased the notes from Mr. Anderson. This was the act of the bank, because it was within the customary and usual powers of the cashier, and within the powers of the bank itself. If the cashier went outside his powers and undertook to make a contract of agency, the act was not the act of the bank either in law or in fact.

The bank offered to prove by proper evidence (Page 30) that no other officer or director or board of the bank participated in the transaction or authorized the cashier's acts. The
24 exclusion of this evidence restricts the cashier's powers for

purposes of this case to the implied powers of cashiers of national banks, which do not include the power to bind his bank by such a contract of agency.

The question whether the direct purchase of notes with the intent to rediscount them, or a dealing in notes as averred in answer is within the power of national banks is immaterial, since the State Courts in effect held that there was no such direct purchase and the plaintiff in error does not in thisCourt rely on such purchase.

IV.

The principles involved in the foregoing questions as to the right of the bank to claim immunity under federal statutes, from liability on account of ultra vires acts of its cashier, and the ultra vires contract of the bank itself, if any, are announced in:

Logan Co. Nat. Bank vs. Townsend 139 U. S. 67.

California Nat. Bank vs. Kennedy 167 U. S. or 362.

Farmers and Merchants Nat. Bank vs. Smith 77, Fed. Rep 129, (Circuit Court of Appeals, Eighth Circuit).

The application of those principles to the facts in this case we have endeavored to show.

V.

Plaintiff in error submits that it is not within the express or implied powers of a national bank to engage in the business of selling mortgage notes on commission, and that any contract by a national bank that it will assume the duties and liabilities of an agent to sell such notes and mortgages for other persons is ultra vires and void.

See The National Bank Act.

Farmers and Merchants Nat. Bank vs. Smith 77 Fed. Rep 129.

California Nat. Bank vs. Kennedy 167 U. S. 362.

The supreme court of North Dakota on the contrary held that when a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its power to collect the claim out of such collateral notes; that the bank as pledgee could not sell the notes, but could only collect them, and in furtherance of its power to collect the principal debt, it could, with the assent of the debtor, act as his agent in the disposition by sale of the this case is contracting to act for Anderson in the sale of these notes, kept entirely within the limits of its power. Citing:

Shinkle vs. Bank, 22 Ohio St. 516-524.

Holmes vs. Boyd, 90 Ind. 332.

John A. Roebling Sons Co. vs Bank, 30 Fed Rep. 744.

Reynolds vs. Simpson, 74 Ga. 454.

Wylie vs. Bank, 119 U. S. 361.

McCraith vs. Bank, 104 N. Y. 414.

First Nat. Bank vs. Nat. Ex. Bank, 92 U. S. 122.

And Morse Banks, Sections 77 and 78.

This is an erroneous construction of the National Bank Act, which provides that national banks shall exercise all such inci-

dental powers as shall be necessary to carry on the business
25 of banking, by discounting and negotiating promissory notes, and loaning money on personal security.

It is contrary to any reasonable construction of the statute. It is not supported by the cases cited, and it is not applicable to this case.

Under the National Bank Act, a national bank may do and may bind itself by contract to do many things not primarily relating to banking. But to act as agent for the sale of mortgage notes for another to third persons would not seem to be one of such things.

To protect itself from loss a national bank may in good faith acquire title to, and temporarily operate and control almost any class of property and contract liabilities in so doing. To do so is not only proper, but is frequently the necessary and only protection against loss of discounts and money loaned."

Plaintiff in error submits that it is never necessary, and therefore never proper that a national bank act as agent to sell the property of another. That the duties and liabilities of such an agency even for the sale of pledged notes and mortgages are never among those which the bank itself must necessarily assume in order to protect itself from loss.

The powers, duties, and liabilities of such an agency are not included in nor incidents of the pledge. They must be conferred and assumed by an independent contract. Under the statutes of North Dakota, a pledgee, as such cannot sell collateral notes and mortgages at private or public sale, but can only collect them.

If not wholly inconsistent with the character of pledgee, such agency is certainly not an incident of or supported by the pledge.

But even if such agency be not always, and by its very nature, outside of those incidental powers necessary to carry on the business of banking, as we believe it to be, if it might
26 ever be included in such powers of a national bank; it would be only when it became reasonably necessary to protect the bank from loss. Such reasonable necessity must be made to appear. It will not be assumed without proof, nor from the contract of agency alone. It must also appear that the power, if any, to assume the duties and liabilities of such agency, was exercised in good faith, for the purpose of protecting existing interests of the bank and not alone for the commissions or profits of such agency.

It should be shown at least, that the principal debt was due or doubtful, the debtor in failing circumstances, the security insufficient, or a just apprehension of the loss of the claim, and reasonable grounds of belief that by assuming the duties and liabilities of such agency the loss would be prevented or reduced.

None of these things do appear, while the contrary was in fact true and does appear. The principal debt was not yet due. The $2,000.00 loan to Mr. Anderson was made April 6th, 1891 (Page 2), was due in eight month (Page 24) and had from sixty to eighty days to run at the time of the pretended contract of agency.

There was no pretense that Mr. Anderson was insolvent or in failing circumstances. The security was unquestionably ample. The bank certainly did invest $6,397.48 in the collateral alone, and the defendant in error claims that it was then worth $7,630.00. The interest was 12 per cent per annum (Page 24), which was certainly remunerative. No loss was or could have been anticipated. No such contract or agency could have been entered into in good faith to prevent or reduce any anticipated loss. There is not the slightest grounds for belief that such agency could or would accomplish any purpose legitimately connected with the business of banking.

The contract in relation to the notes embraced in the correspondence from August 11th to October 7th, 1891, whether a contract of agency or discount, was a separate transaction, independent of the original loan and pledge, and as such it was entered into by the cashier of the bank to secure a further profit, either discount or commission, in addition to the discount on the $2,000.00 loan, which was already secure.

We claimed and still believe that in truth and intent there was no agency. That the transaction was one of discount, with a misunderstanding as to the amount of the net proceeds,
27 and that the agency and all arguments based thereon are hypothetical only. The decision of the state court, however, has bound us to that hypothesis. If there was an agency it was because the reference to and charge of a commission by the cashier made it one in law, and as such it was an independent transaction in a business not authorized by the National Bank Act, nor incidental to any business so authorized, but for an independent profit in the form of such commissions and as such was ultra vires and void.

If there be any relation between such agency and the collection of the $2,000.00 loan, such collection would be only an incident and not a necessary incident of the agency; not the principal transaction to which the agency would be incidental and necessary. A national bank cannot engage in every business transaction merely because some of its results may incidentally promote, hasten or induce the collection of a debt, much less a debt not due and amply secured. If so, there is no class of business a national bank might not enter into as agent, partner or employer of its debtors.

In this case there can be no sincere claim that the collection of the debt was an object of the transaction, or was taken into consideration, much less that it was the principal transaction for the accomplishment of which the agency was necessary.

None of the cases cited by the state supreme court support its decision, or are so nearly in point as to need examination. Wylie vs. the Bank, 119, U. S. 361, cited as most nearly in point, rests on totally different facts and different principles. There it was held competent for a national bank, as the best means of recovering its own property, stolen with that of another, to undertake the recovery of all, and that if it did so, it was liable for want

of digilence, skill and care in the undertaking, or for wrongful use of the property of the other to recover its own.

In other words, the contract was competent if it was the necessary or best means of recovering its own property. It was liable if the property of the other was lost by its tortious acts.

The supreme court of North Dakota further held that whether the contract of agency, as such, was ultra vires or not; if the bank has in fact assumed to act as agent, it must be held to the
28 ordinary duties and obligations of an agent. Special attention is called to "Assumed to act," as a very supple and convenient, but not especially definite phrase. If it is meant thereby to say, "If the bank has in fact acted as agent, has exercised the powers of such agency, has in fact sold the notes, it might be good law, but would have no basis in fact." The bank did not in fact act as agent did not exercise the powers of such agency, and did not ,in fact sell the notes. The attempted purchase of the notes by the bank was not, in fact acting as, or exercising the powers of such agent. but was in violation of such contract of agency, if any. It is not pretended that either the bank or Mr. Titus, the cashier, misled or decieved Mr. Anderson, and certainly neither one sold the notes, and there was no other act contemplated by such an agency. They do not assert or complain of its acts as agent, but the acts of the agent outside of and in violation of his duties as such.

There is the expression that the bank sold the notes to itself. This, of course, is an inaccurate figure of speech, and if it meant more than an attempted purchase by the bank, not under, but in viloation of the powers and duties of such agency it would be contrary to the facts and decision of the state court.

Assumed to act can have but one other meaning equivalent to undertook to act, and contracted to act, which brings us back to the validity of the contract.

The supple uncertainty of the phrase was convenient, but misled the learned Chief Justice to use it with the first meaning with regard to the law, and the last meaning with regard to the facts.

To return to this decision of the state court. Is the principal as stated good law? Can a bank contract by acts to assume duties and liabilities which would be ultra vires as an express contract? Can it do indirectly what it cannot do directly? Has not the state court again confused contract with tort?

It is true that a national bank is liable for its own tort whether committed in pursuance of a business within or beyond its corporate powers. If it acts, its acts must not in themselves be tortious. As in the case of Logan Co. Nat. Bank vs. Townsend 139 U. S. 67, a national bank must not wrongfully retain bonds, although it obtained them under an ultra vires contract to return them. For its own acts as such, a national bank must be responsible, but for its acts as constituting a contract, and imposing contract relations they must be governed like any other form of contract, and be void if the contract be ultra vires.

The state supreme court in its opinion as originally filed stated as its view of the law (Page 43): "The plaintiff, when he authorized a sale by defendant as his agent, did in contemplation of law decline to sell to the agent on the terms agreed or any terms, there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always in contemplation of law is in the attitude of being unwilling to sell to the agent on any terms. Whether the plaintiff was authorized by the law to act as agent for the plaintiff is therefore of no moment, because, even if we concede this proposition, it still remains true that he had never agreed to a purchase of the notes by the defendant, and hence it follows that defendant's assumption of ownership of them, as though plaintiff had assented to a purchase of them by defendant constituted a conversion thereof." This portion of the
29 opinion was stricken out after the petition for rehearing, and constitutes no part of the reported opinion in the 6 North Dakota Report. Page 509. But as the record in this Court was prepared from the opinion as originally filed, it is contained in this record and requires some attention, as it intimates, but does not expressly assert an independent tort in the assumption of ownership by defendant.

As an argument this would be plausible, as a decision it is ambiguous and uncertain.

In another place (Page 42) the Court held that since the agency was created by a written contract, it was not material whether Mr. Anderson relied upon or considered the bank his agent, that the contract in law created the relation of principal and agent. Here it holds it was not material whether the contract was effectual in law since a principal always in contemplation of law is in the attitude of being unwilling to sell to his agent.

But the language of the opinion above quoted raises another question. It takes for granted that the bank assumed the ownership of the notes and holds that it thereby converted them. The expression, assumption of ownership, as used in the opinion alone, and unexplained, is ambiguous. If it be meant thereby that the bank undertook ,agreed and attempted to become the owner by contract, it is true, but that in law does not constitute a wrongful conversion. Nor does the state court so hold except as a violation of its trust as agent.

If it be meant thereby that the bank without authority exercised the right of ownership over the notes to the change of their condition or the exclusion of the owner's rights; that would constitute a wrongful conversion, but is contrary to the undisputed facts, and the state supreme court does not so hold.

If it was intended thereby to say that the bank claimed to be owner, it is correct as an expression of opinion that the transaction was a purchase from Mr. Anderson. The cashier so believed the transaction to be. But not as a claim which was ever coupled with an exercise of dominion over the notes to the exclusion of Mr. Anderson's rights as owner.

We do not claim in this Court, as we did in the court below,

that the bank actually acquired the legal title to the notes by direct purchase from Mr. Anderson, since the state supreme court held there was no evidence that Mr. Anderson consented to such purchase, and not involving a federal question, that issue is settled, right or wrong. What we do claim is that, conceding Mr. Anderson to have been the owner, subject to the pledge, until by this action he divested himself of his title, the bank did nothing in violation of its duties as pledgee, did not exercise any dominion over the notes not authorized by the pledge, did not exclude Mr. Anderson from any right, title, interest, use or possession in or of the notes to which he was entitled as pledgor, did not violate any actual trust reposed in it, did not, in fact, injure Mr. Anderson to the slightest extent nor change his relation to the notes except as he changed it by this action, and that the state courts did not hold that any of these things were done except by the ambiguous expression "assumed to act," and "assumption of ownership," which, if intended in the sense of an exercise of ownership, to the exclusion of any right of Mr. Anderson, was contrary to the undisputed facts, and the facts which the [illegible] court says are undisputed.

No manipulation of the evidence, or of the undisputed facts, or of the legal principles applicable to the case, or even of the new principles of law announced by the State Court, can change the obvious fact that the only violation, if any, of any right or duty, was the attempted purchase of
30 the notes contained in the letter of October 7th, 1891, with the remittances, which should not in law amount to a conversion even if there was a valid agency, which even under the decision of the state court amounted to a conversion only because it was a technical violation of the pretended contract of agency, and that the contract was that the bank should sell mortgage notes for Mr. Anderson to third persons on commission in transactions not necessary or incidental to any legitimate business of the bank.

VI.

There remains for consideration the question whether the pretended contract of agency was one which was within the implied powers of the cashier of a national bank to make on behalf of his bank.

Section 16 of the National Bank Act provides that a national bank shall have power "To exercise by its board of directors, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking" &c.

The cashier of a national bank is a recognized officer thereof, and his powers are fairly well settled and need not be enumerated here. It may be said in general. The cashier is the chief executive officer through whom the whole financial operations of the bank are conducted.

Merchants Bank vs. State Bank, 10 Wall 604-650.

Fleckner vs. Bank, 8 Wheat 338.
Caldwell vs. Mohawk & C. Bank, 64 Barb. 333.
Bissell vs. First Nat. Bank, 69 Pa. St. 415.
He has charge of its property, money and securities.
Wilde vs. Bank, 3 Mason (C C.) 505.
Franklin Bank vs. Stewart, 37 Me. 519.
He is superintendent of its books of accounts.
Sturgis vs. Bank, 11 Ohio, St. 153.
Baldwin vs. Bank of Newberry, 1 Wall 234.
His acts within the scope of the general usage, practice and course of business conducted by the bank will bind the bank in favor of third persons possessing no other knowledge.
Minor vs. Mechanics Bank, 1 Pet. 46-70.
Burnham vs. Webster, 19 Me. 232.
Wakefield Bank vs. Truesdell, 55 Burb 602
He has power to transact as the executive officer of the bank the regular routine business.
Morse vs. Mass. Nat. Bank, 1 Holmes (C. C. 209-211.)
He has power to draw checks and drafts upon the funds of the bank deposited elsewhere.
Merchants Bank vs. Bank of Columbia, 5 Wheat 326.
United States vs. City Bank of Columbus, 21 How. 356.
Chem. Nat. Bank vs. Kohner, 8 Daly 534.
In the last case the Court held, "A cashier is the business officer of a bank, but only in the sense of one who transacts and not one who regulates or controls its affairs. His duty has
31 reference to daily routine business and not to matters involving discretionary authority, which belongs, unless delegated, to the board of directors, as has been quaintly said. 'They are the mind and he is the hands of the corporation,'" and the court held that a cashier had no power to compromise debts
A cashier has no power to discharge the surety on a note. Savings Association vs. Saitor 63 Mo. 24. Merchants Bank vs. Rudolf, 5 Neb. 527, and Bank vs. Haskell, 51 N. H. 116.
A cashier cannot transfer non-negotiable paper.
Holt vs. Bacon, 25 Miss 567.
Burrick vs. Austin, 21 Barb 241.

In brief, the implied powers of the cashier of a National Bank are limited to the usual and customary business of banking, and the ordinary details of such business, and do not extend to any unusual or extraordinary business or transaction which the bank might deem best or necessary for the collection of a doubtful claim or to prevent or reduce an anticipated loss.

Circumstances might render it best or necessary that a bank should purchase, hold and operate temporarily a farm, a factory, or a railroad; but such business or transaction being outside of the usual business of banking or any detail of such business and involving discretionary authority, must be done or expressly authorized by the board of directors. In this case, even if the principal debt from Mr. Anderson to the bank had been past

due and doubtful, if the security had been questionable and liable to become worthless or insufficient; if it had been the best or necessary means of collecting the claim, that the collateral notes and mortgage be sold and the necessary and only way was for the bank as Mr. Anderson's agent to sell for him to a third person, and such agency had been within the incidental powers of the bank, it would still be true that such agency would be so far outside the usual business of banking and so unusual in character as to require the action of the board of directors.

Much more so when in fact none of these things were true. No necessity for such action existed, the business engaged in was independent of the principal debt, and was entered into solely for the profits of the transaction itself.

While a bank may under extraordinary circumstances exercise extraordiary powers if necessary and proper means of conducting its legitimate business, but such extraordinary powers must be exercised by the board of directors and not by the cashier without express authority.

There is no pretense that Mr. Titus, the cashier, had any express powers in the matter or any except the implied authority common to all such officers. The court excluded evidence that he did not have, and held such evidence immaterial. (Page 30.)

In Farmers and Merchants National Bank vs. Smith, 77 Federal Reporter 129-135, it was expressly held by the Circuit Court of Appeals that the cashier of a national bank did not have power to bind his bank by any contract or act in such an agency. That even an endorsement or guaranty of commercial paper, an
32 act usually within the implied powers of a cashier, if done as part of, or carrying out the business of selling mortgage notes on commission, was totally void and did not bind the bank.

The supreme court of North Dakota in this case, has always in its opinions treated the subject as if the bank were a natural person acting through agents, and subject to the same legal principles relating to ratifications and estopple, and not a creature of limited powers in itself, and only acting through its board of directors, and lawfully authorized officers and agents.

A natural person may ratify the acts of his agent in many ways. A bank only by the proceedings which would have originally authorized it, and only in case the bank could originally have authorized it.

A natural person may be estopped by his own acts or omissions. A bank is not estopped by the acts or omissions of its officers or agents unless they had the authority to bind it in that particular manner.

The law is well settled in this Court in favor of the right of a National Bank to plead its want of power. California National Bank vs. Kennedy 167 U. S. 362, and cases therein settled. That it may assert the nullity of an act which is an ultra vires act. That such act cannot be ratified nor its repudiation estopped in any way if it were not within the corporate power of the bank originally.

It is also true that the unauthorized act of a cashier if within the corporate power of the bank acting through its board
33 of directors may be ratified, but only by the same board, and there can be no estopple to deny his authority save by the act of such board.

But in this case, there was nothing in the way of ratification or estopple. The bank did not obtain the notes through the agency, did not retain them under it, or under the transaction, whether as an agency or discount. That it has always denied the agency.

In this case, the law, as we believe it to be, is fortunately consistent with the absolute justice of the case. The absolute injustice of the judgment rendered by the state courts and on the grounds avowed by the defendant in error and upheld by the opinion of the state supreme court tends to shock the moral sense and destroy confidence in courts and the security of property.

We do not claim that Mr. Anderson had no rights in the transaction out of which this action arose. We believe Mr. Anderson honestly meant a discount of $630.00 more than the bank understood it, and that he had the right to rescind and reclaim his paper. We believe Mr. Titus had no right to claim and retain a commission of $35.00 in the transaction, and if Mr. Anderson claimed it, he was entitled to that sum. But to hold that he can disregard his own offers and his just claims and force his paper upon the bank at a fictitious valuation, by the flimsy web of technicalities and misapplication of legal principles affords no one justice.

Upon the grounds that the pretended agency was not within the corporate powers of a National Bank nor the implied powers of its cashier to make, and that it is ultra vires and void either as the act of the cashier or of the bank itself and affords no basis for this action and the judgment rendered therein. This action is respectfully submitted to the end that such judgment may be reversed if to the Court it should seem such reversal is just and proper under the law.

Dated Grand Forks, North Dakota, October 15th, 1898.

BURKE CORBET,
Attorney for Paintiff in Error,
Grand Forks, N. D.

No. 223.

Supreme Court of the United States

Brief of Corbet for Pl. in Err.

OCTOBER TERM, 1898.

NO. 223.

Filed Dec. 16, 1898.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

ON SECOND MOTION TO DISMISS AND AFFIRM.

BRIEF OF PLAINTIFF IN ERROR.

BURKE CORBET, ATTORNEY FOR PLAINTIFF IN ERROR.

The Plaindealer Co., Grand Forks, N. D.

Supreme Court of the United States

OCTOBER TERM, 1898.
NO. 223.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

ON SECOND MOTION TO DISMISS AND AFFIRM.

BRIEF OF PLAINTIFF IN ERROR.

During December, 1897, the defendant in error, Alexander Anderson, by Phelps & Phelps, his attorneys, served upon the plaintiff in error his notice of a motion to be submitted to this Court January 10th, 1898, to dismiss the writ of error in this case and affirm the judgment of the state court, and served therewith his motion, and his brief thereon, and presumably filed such notice, motion and brief with proof of service thereof with the clerk of this court.

January 7th, 1898, the plaintiff in error filed with the clerk of this court its brief on such motion, pointing out the existence of a federal question, and wherein a determination of such question

against the plaintiff in error was necessarily involved the merits of the action and in the decisions rendered and the judgments entered against it in the district and supreme courts of North Dakota, and wherein the plaintiff in error claimed in such districts and supreme courts a right and immunity from liability on account of the alleged acts of its cashier and alleged contract of the bank itself as ultra vires under a statute of the United States, and that each of such courts denied such immunity.

October 24th, 1898, the plaintiff in error filed with the clerk of this court its brief on the merits of this action, including a statements of facts, its specifications of errors and arguments therefrom that a federal question was necessarily involved in the merits of the case and in the decision and judgment of the state court, and that such federal question had been erroneously decided by the state courts against plaintiff in error, and that the state courts had erroneously denied an immunity claimed by plaintiff in error under the statutes of the United States from liability for ultra vires acts of its cashier, and ultra vires contracts by the bank itself.

In this case all questions suggested by the motion are necessarily involved in the merits of the action, and every question involved in the merits is raised by the motion. Any brief argument, or decision of the motion requires the same examination necessary for a determination of the case itself.

The entire brief of the plaintiff in error on the merits, is applicable to the questions suggested by the motion. The statement, pages 3 to 9, and the specifications of errors, pages 9 to 14, as the basis of the argument. The argument, pages 14 to 21, that the federal questions raised are necessarily involved in the merits and in the judgment, and pages 21 to 29, that such questions were erroneously decided and the immunity erroneously denied.

Plaintiff therefore asks the court to refer to its brief on the merits on the consideration of this motion.

We supposed, and still think we covered in our former briefs, all points which properly arise from the record; certain claims and arguments advanced by counsel for defendant in error however, lead us to ask the indulgence of this court while we answer them.

Counsel for defendant in error in his brief and argument on this motion states as facts many things which do not appear in the record. He states that the plaintiff in error, both in its amended answer and in its original answer pleaded its own agency for Mr. Anderson. See his brief, page 9, folio 34. There was

never an amended answer. There was an original answer to the original complaint, neither of which appears in the record either in full or by quotations therefrom. The original answer was amended by leave of court and the amendment appears in the printed record at pages 8 and 9. And there was also its answer to the amended complaint, which appears in the printed record at pages 4 to 8 thereof in which plaintiff in error expressly denied any agency. And that answer speaks for itself.

Counsel for defendant in error cites in support of this statement certain expressions extracted from the opinions of the state supreme court that plaintiff in error admitted the agency.

Isolated expressions extracted from long documents are proverbially untrustworthy, and we dislike to conduct any argument on such basis. The expression found at page 40 of the printed record, and with the context shows that it was neither a quotation from a pleading, nor a judicial determination of any issue then before the court. The subject matter under consideration at that point was not a change of the answer, but of the complaint, and the effect of such change upon a deposition as to value, and the entire matter is wholly foreign to any question before the court.

Unnecessary expressions in the opinion of the state court as to the meaning of a defunct and superseded pleading is not equivalent to a recital of such pleading in the record in this court, and do not constitute a basis for argument as to the effect of pretended admissions in such pleading.

There was in fact no admission of agency in any answer. The state court has not judicially determined, upon that issue presented to it, that the answer contained such an admission. It has as dicta, said that the answer admitted the agency, but has decided the question of agency upon the evidence of the letters and telegrams as constituting a contract of agency. The complaint did not allege an agency in fact, but only certain telegrams as constituting a contract of agency. A defunct answer where, as in this case, both the complaint and answer have been superceded by new and substituted pleadings, and upon substantially a new and different cause of action, is at most merely an admission of the allegations of such answer subject to proof, as any other admission.

Not only the answer to the amended complaint, but the amendment to the answer to the original complaint, raise the issue of agency, and raise the issue of any admission in the original answer and such original answer was not a part of the evidence in the state court.

An admission of agency, if any, would be foreign to any question before this court. An agency presupposes a contract express or implied, between the principal and the agent, which with the law determines their rights and liabilities. That there was a contract of agency between the parties to this action has been established by the decision of the state court. We say the decision was erroneous, but we suppose it is final. The question here is not the fact of agency or contract of agency, but its validity; was the agency found by the state court ultra vires and void?

If the plaintiff in error were a natural person competent in all matters to act personally, an admission of agency would dispose of the question whether the cashier, Mr. Titus, had authority on its behalf to make the contract of agency, but being a corporation which can only act through an officer ,an admission of agency or contract of agency, if made, can be no more than an admission that the officer so contracted. His authority remains a question of law.

This applies equally to the allegations in the answer to the amended complaint, that the bank wrote the letter and made the remittance of October 7th, 1891, and that the bank wrote certain letters and telegrams offering to purchase or discount the notes, which can at most only amount to an admission that the officers of the bank did these things in its behalf, and with the letters themselves showing they were all written by Mr. Titus, amounts merely to a statement that Mr. Titus did these things.

We have already shown in former briefs that none of the letters or telegrams constituting the alleged contract of agency were stated by such answer to have been written by the bank. The questions whether the acts of the cashier or the contracts of the bank itself as to agency, if any, are ultra vires would not be effected by the so-called admissions in the pleadings.

As we have pointed out in our former briefs, it is clear that the only conversion of the notes by the bank averred by the amended complaint, and contemplated by the opinion and judgment of the state supreme court consisted solely in an attempt by the bank, to accept for itself the offer of Mr. Anderson, and itself purchase the notes while under a contract with Mr. Anderson to act as his agent for the sale of the notes to third parties, a mere naked sale by the agent of its principal's property to itself, and not any removal, disposition, change, destruction, concealment, of or unauthorized act of ownership over the property.

This is the kind of conversion, if any, of which the bank was

guilty, according to the clear meaning of the pleading and the opinion.

Counsel for defendant in error does not now entirely abandon this position, but as a possible safeguard, in his briefs on these motions advances the new and further claim that there was a conversion regardless of any agency or contract of agency. See his brief on this motion, pages 15 and 16.

The acts claimed to constitute an actual conversion of the notes in his words are "That plaintiff in error, immediately following the telegrams entered up the collateral notes as its own property, and collected them as its own, without leave of defendant in error." See his brief Fol. 59, pg 15.

There are many sufficient answers to this claim. The first of which is that it is not supported by, but is contrary to the record. Mr. Titus as a witness for the defendant in error testified that there was an entry in the bills receivable register of the bank of the seven notes entered up as of the date of October 7th, 1891. See record page 17, and that five of the notes had been paid at the time of testifying, record page 25, which was on the 2nd or 3rd day of February, 1897; record page 11. There is no authority for the statement that the bank collected the five notes or any of them without authority from Mr. Anderson. It appears that one of the notes was paid by J. D. Phelps December 1st, 1892. Record page 27, and it does not appear when any of the other notes were paid, except that five have been paid February 2nd, 1897. There is no presumption that the notes were paid when due, and it is apparent that at least one was over due and unpaid at that date. Only two of the notes were due at the time of the commencement of this action, March, 1893. Under the original bailment as collateral for the loan of $2000.00 the bank was authorized, and it was its duty to collect the notes as they fell due. Owing to the commencement of this suit the bank had no choice but to retain and collect the notes.

We will not comment upon the sufficiency of the evidence to sustain the new claim of an actual conversion by entering a description of the notes in a bills receivable register, and a collection of five of them. This court does not consider such questions in cases like this. If it did it is apparent at a glance that such an entry in a private record and a proper and necessary collection of collateral notes pledged to it would not constitute a conversion, and the state courts have not held that they would.

Another answer is that defendant did not plead any such conversion, but the technical conversion of a sale by an agent of it's

principal's note to itself. The right to recover on account of an entry in a private register, and for the collection of the notes cannot be asserted for the first time in this court. Counsel says in his brief, folios 59 and 60: "Whether or not this conversion was the conversion set out in the complaint is immaterial." We do not think so. If evidence of such a conversion had been received without objection the district court of the state on proper application, would doubtless have amended the complaint to conform to the proof. But the district court would then have sent this new issue to a jury, or decided that the evidence was conclusive for or against such claim.

None of these things were done. If they had been done the issues of law, not of fact, then raised could have been passed upon by the state supreme court, but since they were not raised nor passed upon in the district court, they could not be and were not passed upon in the state supreme court.

The rule that this court assumes jurisdiction in such cases only where the federal question is involved in the merits of the case, refers to the case actually presented to and tried in the state court, not to a cause of action which might have been, but was not presented.

The state supreme court based its decision and judgment entirely upon the alleged contract of agency. Even that part of the opinion cited by counsel for the defendant in error, that the court deemed the question of ultra vires immaterial, which part the court subsequently struck out of the opinion, and excluded from the reported opinion in the state reports, but which appears in the printed record on page 43, does not say that the agency or the contract of agency was immaterial, but that it was immaterial whether such agency or contract was ultra vires.

The argument being that Mr. Anderson by making the contract of agency, in law declined to sell to the bank on any terms, and that the bank's assumption of the right to purchase the notes, or assumption of ownership against such refusal to sell constituted a conversion.

In our brief on the merits on pages 17 and 25, and in our brief on the former motion, page 9, we have undertaken to show that it was very material whether the alleged agency or contract of agency was ultra vires, and that the statement that it is not material is inconsistent with the basis of the decision as expressed in the opinion, and wholly unsupported by the record or any facts found by the court; we will not repeat that argument here.

The state supreme court upon re-examination of the opinion

was so dissatisfied with the proposition as to strike it, and all the arguments in its support from the opinion. It appears in the record because the proposed record was prepared from the opinion as originally filed before the rehearing, and was served and filed before discovering the change.

We may be bound in this as in all other respects by the agreed record. We may have no right to comment upon or even state the change in the opinion; we do not consider the change important, for it seems to us the proposition stricken out is so clearly erroneous as to be harmless, but our state supreme court is entitled to credit for the correction.

We need not comment upon the doctrine of the law of the case invoked by counsel for the defendant in error. It does not appear to have been raised or applied by the state supreme court. It could in no event have any application to this writ of error. Plaintiff in error could not have a writ to bring the case to this court until a final judgment in the court of last resort in the state. We obtained that writ in due time. It brings here for examination every federal question adversely decided by the state supreme court on the last appeal, regardless of the fact that such question was decided in the same way on a former appeal, otherwise the decision of the state court on a federal question controls this court.

Counsel, however, claims that the state supreme court on former appeals decided that the relations of the parties was that of principal and agent, that such decision became the law of the case, but the relation of the parties was a question of fact, not of law, and that question remaining in issue had to be tried at the last trial.

The last trial was an entirely new trial of every issue of fact. The record of that trial is all here and all that is material to the federal questions, as well as much that is not, is contained in the printed record.

Nor need we dwell on the law of torts as committed by a corporation. In our brief on the merits we undertook to make our position clear. Of course, we do not claim that a corporation is not liable for its own tort, or that a national bank may not be liable for the actual conversion of notes intrusted to its care.

We do claim that by the pleadings, the evidence, the undisputed facts and the decision of the state supreme court, and by each of them, there was no actual conversion, that the so-called conversions consisted of two factors only. First: The correspondence between the cashier and Mr. Anderson, construed to be a contract of agency. And second: The letter and remittance of

October 7th, 1891. We do not believe that in law these two factors constitute a conversion. Our supreme court has said that in North Dakota they do constitute a conversion, but that only makes it that kind of a conversion. If the pretended contract of agency contained in the correspondence be ultra vires and void, not the act of the bank, there remains but one factor, the letter and remittance of October 7th, 1891; this letter and remittance alone does not constitute a conversion, and our supreme court has not said that it did.

If it appear strange that a technical violation of an executory contract constitutes a tort, we disclaim all responsibility for the decision that it does; but that is the decision reduced to its plainest terms.

If the state supreme court had decided that such contract of agency and the letter and remittance did not constitute a conversion, there might not be any federal question involved. But, right or wrong, the conversion and judgment rests primarily upon the pretended contract of agency, and we say that contract was ultra vires, void, not the act or contract of the bank, and we claim immunity from liability on account thereof under the statutes of the United States.

Courts very justly regard with extreme impatience charges and denials of wrong doing or injustice between litigants beyond the regular and necesary practice in presenting the essential facts and the law, and we do not indulge in such charges or denials.

The uncalled for charges of wrong doing by the bank, a violation of duty, importing a moral depravity in its officers would not justify us in taking the time of this court to hear a denial. The claim for damage under rule 23 perhaps can be claimed as an excuse for saying that there is not a scintilla of evidence of any intentional wrong, or attempt to defraud or deceive, or any actual wrong ,or fraud or deception of Mr. Anderson. The so-called tort is a mere creature of judicial construction and a mutual mistake of the parties as to the legal effect of their correspondence.

We cheerfully acknowledge our present belief that Mr. Anderson meant a discount of five hundred dollars from the principal and interest, and claim as honest belief and a better basis therefor on Mr. Titus' part that the offer was five hundred dollars discount from the principal sum making an honest misunderstanding of six hundred and thirty dollars and some charges for taxes, etc. Mr. Anderson could have had his notes on demand and the return of the remittance, but believing he was right, commenced his action

first for the difference, failing in that his counsel sought to take advantage of the technical construction of a few expressions in Mr. Titus' letters, and force the notes upon the bank at the full principal and all accrued interest, without any discount. This is not right. Mr. Anderson has received every cent he contracted for, he has received it from the bank to whom he always intended to sell and in fact supposed he had sold. He did not demand a rescission on discovering his mistake. The hands of the officers of the bank have been scrupulously clean in the transaction.

Counsel for defendant in error speaks of the smallness of the sum, to contest so long and to bring to this court. It is small but the very smallness of the sum compared with the expense necessarily incurred in the defense bespeaks the good faith of the bank in this defense, the consciousness of right, and the belief that somewhere the right must prevail.

We know that in this court the principles and not the amount involved receive the attention deserved.

We respectfully submit this motion.

BURKE CORBET.
Attorney for Plaintiff in Error.

In The Supreme Court of 1
THE UNITED STATES.

OCTOBER TERM, 1898.

NO. 223.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

PLAINTIFF IN ERROR, 2

VS.

ALEXANDER ANDERSON,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

NOTICE OF MOTION TO DISMISS WRIT OF 3
ERROR, AND AFFIRM JUDGMENT BELOW.

TO MESSRS. W. E. DODGE

AND

BURKE CORBET,

ATTORNEYS FOR PLAINTIFF IN ERROR:

Please take notice, that at the Court room of the Supreme Court of the United States, in the City of

Washington, D. C., on the nineteenth (19th) day of December, A. D., 1898, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the undersigned, on behalf of the above named defendant in error, will move the Court upon the agreed record in the above entitled action filed August 30th, 1898, and upon the reported decisions of the Supreme Court of the State of North Dakota mentioned at Folio 74 thereof, to dismiss the writ of error issued in the above entitled action on the 6th day of November, A. D., 1897, and to affirm the judgment of the Supreme Court of the State of North Dakota, mentioned in said writ of error and to affirm the judgment of the District Court in and for the County of Grand Forks and State of North Dakota, together with costs of this motion and damages of ten per cent. upon the amount of said judgment, in the action wherein the above named defendant in error, Alexander Anderson, was plaintiff, and the above named plaintiff in error, The First National Bank of Grand Forks, North Dakota, was defendant; the judgment of which District Court was rendered on the 3rd day of June, A. D., 1897, and the judgment of which Supreme Court affirming the same was rendered on the 4th day of October, A. D., 1897.

Said motion will be based upon the ground that, although the record may show that this Court has jurisdiction, it is manifest that said writ of error was sued out and this appeal taken for delay only, and that the question on which the jurisdiction of this

Court depends is so frivolous as not to need further argument, in that

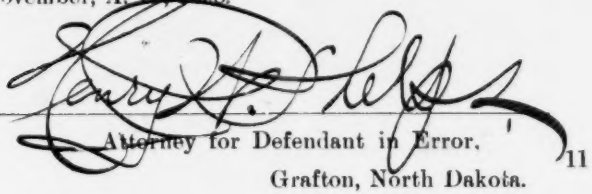
I.

The alleged Federal question attempted to be raised by plaintiff in error, was not necessarily involved in the decision arrived at and rendered either in said Supreme Court of the State of North Dakota or in the District Court in and for the County of Grand Forks and State of North Dakota; but the said judgments were rendered and said decisions made on settled pre-existing rules of general jurisprudence.

II.

It is apparent on the face of the record that the question on which the jurisdiction, if any, of this Court depends, was manifestly decided right in the Courts below, and this case ought not to be held for further argument.

Dated at Grafton, North Dakota, this 22nd day of November, A. D. 1898.



Attorney for Defendant in Error,
Grafton, North Dakota.

MOTION TO DISMISS WRIT OF ERROR AND AFFIRM JUDGMENT BELOW.

Now comes the above named defendant in error, Alexander Anderson, by Henry W. Phelps, his attorney, appearing specially to object to the juris-

12 diction of the Court, and moves the Court that the writ of error issued in the above entitled cause on the 6th day of November, A. D., 1897, be dismissed and the judgments below be affirmed, together with damages and costs, upon the record and reported decisions and upon the grounds specified in the preceding notice of motion therefor.

Dated, December 19th, A. D., 1898.

13

Henry H. Shelton

Attorney for Defendant in Error,
Grafton, North Dakota.

557.

557

In The Supreme Court of

THE UNITED STATES,

OCTOBER TERM, 1897.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

PHELP & PHELPS,
ATTORNEYS FOR DEFENDANT IN ERROR,
Grafton, North Dakota.

BATES THE PRINTER, GRAFTON, N. D.

INDEX.

In The Supreme Court of

THE UNITED STATES,

OCTOBER TERM, 1897.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,
Plaintiff in Error.

vs.

ALEXANDER ANDERSON,
Defendant in Error.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

To Messrs. W. E. Dodge and Burke Corbet,
Attorneys for Plaintiff in Error:—

Please take notice, that upon the entire record in the above entitled action and more particularly upon the writ of error, the petition and assignment of errors for the same, the pleadings in the Court below and the opinion of the Supreme Court of the State of North Dakota in the action hereinafter mentioned, handed down

on the 4th day of October, A. D., 1897,—at the court room of the Supreme Court of the United States, in the City of Washington, D. C., on the 10th day of January, A. D., 1898, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the undersigned, on behalf of the above named defendant in error, will move the Court to dismiss the writ of error issued in the above entitled action on the 6th day of November, A. D., 1897, and to affirm the judgment of the Supreme Court of the State of North Dakota, mentioned in said writ of error and to affirm the jndgment of the District Court in and for the County of Grand Forks and State of North Dakota, together with costs of this motion and damages of ten per cent upon the amount of said judgment, in the action wherein the above named defendant in error, Alexander Anderson, was plaintiff, and the above name plaintiff in error, the First National Bank of Grand Forks, North Dakota, was defendant; the judgment of which District Court was rendered on the 3rd day of June, A. D., 1897, and the judgment of which Supreme Court affirming the same was rendered on the 4th day of October, A. D., 1897.

Said motion will be based upon the ground that, although the record may show that this Court has jurisdiction, it is manifest that said writ of error was sued out and this appeal taken for delay only, and that the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument, in that

I.

The alleged Federal question attempted to be raised by plaintiff in error, was not necessarily involved in the decision arrived at and rendered either in said Supreme Court of the State of North Dakota or in said District Court in and for the County of Grand Forks and State of North Dakota; but the said judgments were rendered and said decisions made on settled pre-existing rules of general jurisprudence.

II.

It is apparent on the face of the record that the question on which the jurisdiction, if any, of this Court depends, was manifestly decided right in the Courts below, and this case ought not to be held for further argument.

Dated at Grafton, North Dakota, this 15th day of December, A. D., 1897.

PHELPS & PHELPS,
Attorneys for Defendant in Error,
Grafton, N. Dak.

13

In The Supreme Court of THE UNITED STATES,

OCTOBER TERM, 1897.

14 IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,
Plaintiff in Error.

vs.

ALEXANDER ANDERSON,
Defendant in Error.

15

MOTION TO DISMISS WRIT OF ERROR.

Now comes the above-named defendant in error, Alexander Anderson, by Phelps & Phelps, his attorneys, appearing specially to object to the jurisdiction of the court, and moves the court that the writ of error issued in the above en-
16 titled action on the 6th day of November, A. D. 1897, be dismissed and the judgments below be affirmed, together with damages and costs, upon the record and upon the grounds specified in the preceding notice of motion therefor.

Dated, January 10th, A. D. 1898.

PHELPS & PHELPS,
Attorneys for Defendant in Error,
Grafton, North Dakota.

COMPLAINT.

The following is the amended complaint of defendant in error in the court below:

STATE OF NORTH DAKOTA

County of Grand Forks.

IN DISTRICT COURT,

FIRST JUDICIAL DISTRICT.

ALEXANDER ANDERSON,
Plaintiff,

vs.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,
Defendant.

The plaintiff complains and alleges:

I.—That at all the times hereinafter mentioned, the defendant was, and still is a National Banking corporation duly organized and existing under the general Acts of Congress of the United States relating to National Banks, and doing a general banking business at the City of Grand Forks, in the State of North Dakota.

21 II.—That on the First day of October, A. D. 1890, the plaintiff was the owner in fee of those tracts or parcels of land lying and being in the County of Grand Forks and State of North Dakota, described as follows, to-wit: The North East quarter of Section Five (5), and the North West quarter of Section Nine (9), in township One Hundred and Fifty-Four (154) North, of Range Fifty-Three (53) West, containing Three
22 Hundred and Twenty (320) acres more or less, according to the United States Government survey thereof, and that the value of the same then was and now is the sum of Seven Thousand ($7000.–) Dollars.

III.—That on the First day of October, A. D, 1890, the plaintiff bargained, sold and conveyed said lands by deed of warranty to one John A.
23 Willson, and delivered the said deed thereof to said John A. Willson, and in consideration thereof, the said John A. Willson executed and delivered to the plaintiff his seven promissory notes for the sum of One Thousand ($1000.–) Dollars each, signed also by Sarah J. Willson, Annie Warren and Henry Warren, Sr., with interest thereon
24 at the rate of nine per cent. per annum from their date, payable annually, each dated October 1st, 1890, and due and payable respectively December 1st, 1891; December 1st, 1892; December 1st; 1893; December 1st, 1894; December 1st, 1895; December 1st, 1896, and December 1st, 1897; and said John A. Willson, Sarah J. Willson, Annie Warren and Henry Warren, Sr., also executed and delivered to the plaintiff at the same time

their certain mortgage upon said lands, and also certain other lands therein described,—in all four hundred and eighty (480) acres, securing payment of said promissory notes to the plaintiff, his heirs, executors, administrators and assigns. 25

IV.—That on or about the sixth day of April, A. D. 1891, the plaintiff borrowed from the defendant, at Grand Forks, North Dakota, the sum of Two Thousand ($2000.-) Dollars, and executed and delivered to the defendant his promissory note therefor, and at the same time deposited with the defendant, as collateral security for the payment of such sum, the seven promissory notes of J. A. Willson and others, in favor of the plaintiff, hereinbefore mentioned, and endorsed the same to the defendant as such collateral security, and further executed and delivered to the defendant as part of such collateral security an assignment of the mortgage hereinbefore mentioned, which secured payment of said promissory notes. 26 27

V.—That on the 3rd day of October, A. D. 1891, the defendant telegraphed to the plaintiff at Seattle, Washington, requesting plaintiff to telegraph the defendant his best offer for a sale of said seven promissory notes, by the defendant, for the plaintiff, to a third person who was not named in said telegram from defendant to plaintiff, and thereupon the plaintiff telegraphed to the defendant as follows:—"To First National Bank, Grand Forks, North Dakota,:—Will give discount of Five Hundred Dollars. Alex. Anderson." 28

VI.—That the defendant duly received said

telegram from the plaintiff, and thereupon, the defendant, wrongfully and in violation of its duty as plaintiff's agent for the sale of said seven promissory notes, converted the said notes to its own use and sold the same to itself, and on the 7th day of October, A. D., 1891, the defendant remitted to the plaintiff the sum of four thousand three hundred and ninety seven and 48-100 ($4397.48) dollars, part of the proceeds of said sale, and mailed to the plaintiff his promissory note to the defendant for Two Thousand ($2000.–) Dollars hereinbefore mentioned, and notified the plaintiff that defendant's commission for selling said seven promissory notes was the sum of Thirty-Five ($35.–)Dollars; but the defendant has wholly failed to pay or remit, or cause to be paid or remitted to the plaintiff the balance due him on said sale or any part thereof, and the defendant is now indebted to the plaintiff, as and for said balance due him, in the sum of Twelve Hundred and Thirty-two and 52-100 ($1232.52) Dollars, with interest thereon at the rate of seven per cent per annum, from and after the 7th day of October, A. D. 1891.

VII.—That at the time of the sale and conversion of said seven promissory notes, as aforesaid, the same were of the value of Seven Thousand Six Hundred and Thirty ($7630.–)Dollars, lawful money of the United States, and that the same had not been paid to the plaintiff, nor any part thereof.

VIII.—That on receiving from the defendant

said remittance of four thousand three hundred and ninety-seven and 48-100 ($4397.48) dollars and said note for two thousand ($2000.00) dollars, the plaintiff forthwith mailed and deposited in the post office at the City of Seattle, in the State of Washington, directed to the defendant, at Grand Forks, North Dakota, a written notice that he would not accept said remittance and note as full payment of the proceeds of said sale; but that he would insist that defendant account to plaintiff for, and remit to him the balance due him upon the full amount owing to plaintiff on said notes at the time of said sale, to wit:—the sum of Seven Thousand Six Hundred and Thirty ($7630.) Dollars, less the Five Hundred ($500.–) Dollars discount which had been agreed to by plaintiff, as aforesaid; but at the time of writing, mailing and depositing said notice, as aforesaid, the plaintiff relying on the defendant's telegrams and letters aforesaid, and being induced and misled thereby, believed the sale aforesaid had been made by the defendant, as plaintiff's agent, to some third person. 33 34 35

The plaintiff herein now elects to waive the wrongful element in the sale by defendant to itself hereinbefore mentioned, for the purpose of maintaining this action as a suit in assumpsit, to recover from the defendant the value of the said promissory notes as aforesaid at the time of the conversion hereinbefore alleged, less the remittance already made, as aforesaid, with interest from the the date of said conversion upon the balance, at 36

the rate of seven per cent. per annum,—pursuant to the opinion of the Supreme Court of the State of North Dakota rendered on the second appeal of this action, to said Court.

IX.—That prior to the commencement of this action, the plaintiff demanded and caused to be demanded from the defendant, payment of the balance of the proceeds of the sale of said seven promissory notes aforesaid, but that the defendant has refused and neglected, and still refuses and neglects, to pay the same or any part thereof to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of Twelve Hundred and Thirty-two and 52-100 ($1232.52) Dollars, with interest thereon at the rate of seven per cent. per annum from and after the seventh day of October, A. D., 1891, together with the costs and disbursements of this action, and for such other and further relief as may be just.

Dated, March 25th, A. D., 1893.

PHELPS & PHELPS,
Plaintiff's Attorneys,
Grafton, N. D.

ANSWER.

Which complaint defendant answered, setting up the following defense:

I.

Denies each and every allegation therein contained, except as hereinafter specifically admitted.

II.

Admits paragraph one (I) of said complaint but denies that said banking business included any agency for the sale of notes, mortgages or securities for other persons.

III.

Admits that October 1st, 1890, the record title to a part only of the North East quarter (N. E. ¼) of section five (5), township one hundred fifty-four (154), range fifty-three (53) and part only of the North West quarter (N. W. ¼) of section nine (9), township one hundred fifty-four (154), range fifty-three (53), was in plaintiff, and was by him conveyed to said Wilson, and denies that said lands were then or have since been worth to exceed Forty-six hundred ninety-five and 60-100 ($4695 60) Dollars. Admits the execution of the notes and mortgage on said lands and on the North East quarter (N. E. ¼) of section four (4), Township one hundred fifty-four (154) Range fifty-three (53), and alleges that said last named land was not then and has not since been worth to exceed thirteen hundred ($1300.00) Dollars, over and above the incumbrances thereon and denied each and every other allegation in paragraph two (II) and three (III) of said amended complaint.

IV.

Admits paragragh four (IV) of said amended complaint.

45 V.

Admits that plaintiff telegraphed defendant "Will give discount of hundred dollars" and denies each and every other allegation of paragraph (V) of said amended complaint, and especially denies that defendant ever telegraphed the request referred to in said paragraph, or ever made such request to plaintiff.

46 VI.

Admits that defendant received said telegram from plaintiff, and that defendant wrote plaintiff as follows:

"GRAND FORKS, N. D., October 7th, 1891.

MR. ALEX. ANDERSON,

Seattle, Washington.

47 DEAR SIR.—

Your wire October 5th to hand.

Discount	$ 500 00
Half per cent. *commission for selling* the paper	35 00
Release and record of $80. mortgage given Gates	2 00
48 Record assignment	1 50
1890 taxes you stipulated to pay	47 02
Attorney for examination abstract	5 00
Continuing abstract	4 50
Your note	2000 00
Exchange on New York	7 50
Dft. for balance	4397 48
	$7000 00

Returns for J. A. Willson 7 notes. In my judgment, this is a good trade for you. 49

Yours,

S. S. TITUS, Cr."

and mailed therewith to plaintiff his $2000.00 note and defendant's draft for $4397.48, and denies each and every other allegation of paragraph six (VI) of said amended complaint; and defendant especially denies that it was ever the agent of plaintiff for the sale of said notes, or for 50 any other purpose whatever, or ever acted or undertook to act as such agent, or ever sold such notes or any thereof to itself, or ever wrongfully converted said notes or any thereof, or ever violated any duty or obligation to plaintiff, or that it is now or ever has been indebted to plaintiff in the sum of twelve hundred thirty-two and 52-100 ($1232.52) Dollars, or any other sum or amount 51 whatever.

VII.

Denies each and every allegation of paragraph seven (VII) of said amended complaint and denies that there ever was a sale and conversion of said notes, or any thereof, as referred to, and denies that on October 7th, 1891, or at any time prior thereto said notes were worth seven thousand six 52 hundred and thirty ($7630.00) dollars, or any other sum or amount in excess of Six thousand ($6,000) dollars.

VIII.

Admits that about October 13th, 1891 plaintiff wrote defendant as follows:

"SEATTLE, WASHINGTON, October 13th, 1891.

FIRST NATIONAL BANK,

Grand Forks, N. D.

GENTLEMEN:—

Your letter, with enclosed draft for $4,397.48 and note of $2,000.00, is at hand, which I cannot accept. I wired you I would give a discount of Five Hundred Dollars, and you make a discount of about $1,175. I did not agree to pay any other expenses. These notes call for $7,000.00, and $630, interest. I shall expect balance of money by return mail.

Yours respectfully,

ALEX. ANDERSON."

and denies each and every other allegation of paragraph (VIII) and nine (IX) of said amended complaint, and especially denies that plaintiff was ever misled in any manner by defendant's telegrams and letters, or any thereof, or ever believed or acted on any belief that any sale had been made by defendant as plaintiff's agent to a third person, or ever recognized defendant as his agent for the sale of said notes, or for any other purpose or ever recognized any such sale, or ever considered or supposed that he was dealing with any person but defendant, or ever claimed, demanded or in any way referred to or considered the proceeds of any sale or supposed sale by defendant as a basis for his claim against defendant, and alleges that plaintiff claimed the balance above referred to upon the basis and claim of a sale of said notes by plaintiff to defendant as principals.

IX.

Defendant alleges the truth and facts in relation to said transaction to be as follows and not otherwise. 57

From April 6th, 1891 to October 5th, 1891, defendant held said seven notes as collateral to plaintiff's note of Two thousand ($2000.00) dollars; during and prior to said period by and in certain conversations, letters and telegrams, plaintiff offered to sell said notes to defendant at certain 58 discounts from face, and defendant offered to purchase them from plaintiff at other and greater discounts.

X.

The defendant expected to rediscount said notes in case it purchased them from plaintiff, and did not desire to purchase unless it had reasonable assurance of being able to rediscount them on 59 terms profitable to itself. Its offers to purchase from plaintiff were made only when it had such assurance, and defendant in its letters and telegrams referred to third parties to whom it expected to sell or rediscount said notes in case it purchased from plaintiff, as a reason why a prompt answer was desired. That plaintiff was interested in such prospective rediscount or sale 60 by defendant to a third party, for the reason that the prospect or assurance of such sale constituted an inducement to defendant to purchase from plaintiff, but for no other reason; such rediscount or sale by defendant in case any should be made, would in itself be a transaction wholly between defendant and a third person, and to which plaintiff

would be in no sense a party, and in which, or in
61 the terms, conditions or proceeds of which plaintiff would have no claim, right or interest whatever, and from said conversations, letters and telegrams the foregoing facts became, and were fully known by and between the parties to this action.

XI.

That throughout said transaction defendant,
62 by its officers, understood all negotiations to be for an absolute sale of said notes by plaintiff to defendant, and understood and believed, and still believes, and was, and is justified in believing that plaintiff so understood said negotiations. That all communications from defendant to plaintiff in relation thereto were with that intent and purpose, and defendant
63 intended they should be, and believed and still believes they were so understood by plaintiff, and that all said communications considered together disclose said intent. That all communications from plaintiff to defendant were understood and believed by defendant to be so intended by plain-
64 tiff, and defendant was, and is justified in so believing, and said communications considered together show such intent.

XII.

That upon the receipt of plaintiff's telegram, and from the terms thereof, together with the proceedings, negotiations and communications in relation thereto, as to the condition of the title to

said lands, and certain agreements made by plaintiff in regard to taxes, and the reasonable commission and expense of clearing the title, defendant believed and was justified in believing that plaintiff intended said telegram as an offer to sell said notes to the defendant for sixty-five hundred ($6500.00) dollars less plaintiff's note of two thousand ($2000.00) dollars, and less the aforesaid taxes and expenses of clearing the title to said lands, amounting to about one hundred two and 52-100 ($102.52) dollars. 65 66

XIII.

Acting upon said belief, defendant accepted said offer, or supposed offer, and wrote the aforesaid letter of October 7th, 1891, with the enclosures of note and draft aforesaid, and defendant alleges that thereby was completed a contract by and between the parties hereto, whereby plaintiff sold to defendant all of said notes, and that plaintiff received payment in full therefor. 67

XIV.

That if there was any mistake of fact in regard to the terms of said offer, it was only as to the amount for which plaintiff intended to offer the notes for sale, and the payment of said one hundred and two and 52-100 ($102.52) dollars, and was not as to any question of agency; neither plaintiff nor defendant had then thought of or referred to any agency, and if there was any mistake of fact, the same was made through the fault of plaintiff, and plaintiff did not seek to avoid said 68

69 contract or rescind the same on account of any such mistake.

Wherefore, defendant demands judgment against plaintiff for its costs and disbursements in this action.

Dated, Grand Forks, North Dakota, October 23rd, 1895.

BURKE CORBET,

70 Attorney for Defendant.

TRIAL.

This cause came on regularly for trial on February 2nd and 3rd, 1897, in the district court in and for Grand Forks county, N. D., plaintiff
71 below appearing by Phelps & Phelps, his attorneys, and defendant appearing by Burke Corbet, its attorney. (Three previous trials had been had, and three previous appeals taken by plaintiff, resulting in reversals and judgment directing this fourth trial.)

As far as is material for the purposes of this
72 motion, we present the following parts of the record of trial proceedings:

Plaintiff testified:

"On the Third day of October, 1891, I was owner of the said seven promissory notes, and on the said date, I received a message purporting to have been sent to me by the defendant, relating to said notes.

This message read as follows: 73

"October 3rd, 1891.

Alexander Anderson,

Seattle, Washington.

Did you receive our letter September Fourteenth? Wire us your best offer so we can advise a party who said he would hold his money till we heard from you. 74

FIRST NATIONAL BANK."

On October 5th, 1891, I replied to this message by sending to the defendant the following telegram:

"Seattle, Washington, October 5th, 1891.

First National Bank,

Grand Forks, North Dakota. 75

Will give discount of Five Hundred Dollars.

Alex Anderson."

I received a reply to this telegram by letter from the defendant enclosing a New York draft for Four Thousand Three Hundred and Ninety-seven Dollars and Forty-eight cents, payable to myself; also my note to the defendant for Two Thousand Dollars, due December 14th, 1891, with interest paid to its maturity, duly canceled. This is the same note mentioned in paragraph Four of the complaint in this action. 76

The letter last referred to reads as follows, written by S. S. Titus, defendant's cashier:

"GRAND FORKS, N. D. October 7th, 1891.

77 MR. ALEX. ANDERSON,
Seattle, Washington.

DEAR SIR.—

Your wire October 5th to hand.

Discount	$	500 00
Half per cent. *commission for selling* the paper		35 00
78 Release and record of $80. mortgage given Gates		2 00
Record assignment		1 50
1890 taxes you stipulated to pay		47 02
Attorney for examination abstract		5 00
Continuing abstract		4 50
Your note		2000 00
Exchange on New York		7 50
79 Dft. for balance		4397 48
		$7000 00

Returns for J. A. Willson 7 notes. In my judgment, this is a good trade for you.

Yours,

S. S. TITUS, Cr."

80 I replied to this letter on October 13th, 1891, by letter, which I sent to the defendant, reading as follows:

SEATTLE, Washington, October 13th, 1891.

FIRST NATIONAL BANK,
Grand Forks, N. Dak.

GENTLEMEN:—Your letter with enclosed draft for $4,397.48, and note of $2,000, is at hand, which I cannot accept. I wired you I would give

a discount of Five Hundred Dollars, and you made a discount of about $1,175. I did not agree to pay any other expenses. Those notes call for $7,000, and $630 interest. I shall expect balance of money by return mail. 81

Yours Respectfully,

ALEX. ANDERSON."

I have never received any further payment or remittance of any nature from the defendant, for the proceeds of the sale of those seven Willson notes mentioned in the complaint. 82

No portion of said notes has ever been paid to me by the signers of the same, nor in any other manner than by the remittance of the defendant which I have mentioned.

I have the letter of September 14th, which is mentioned in the first telegram I have referred to. It is written by S. S. Titus, defendant's cashier and reads as follows: 83

GRAND FORKS, N. D., Sept. 14th, 1891.

MR. ALEX. ANDERSON,

Seattle, Washington.

DEAR SIR:—We never make a trade in the way you mention, that is, pay a part, and later on send or pay more. We, if we make a trade with anyone, always close it up at once; then it is complete and out of the way. If I had a basis to work on I might find some one who would take the paper. You offer it at $350 discount. We offered you a trade at $1,000 discount. Now, if you will make it $700 or $800 and *allow us a small commission*, I will try and *place the paper for you*. 84

85 You, as I wrote you to make the title clear and straight, if anything should come up in the deal. The paper could be sold easier if it all run not to exceed five years. Capitalists kick on anything over five years. Money is close, and is going to continue. Wheat is going down every day. Looks as though 65 to 70 cents will be the average price farmers will receive for this crop. If
86 you care *to have us go to work* on these terms, you write or wire me.

Yours,

S. S. TITUS, Cr."

(Plaintiff's other testimony also sustained the allegations of the complaint.)

Defendant's cashier testified, in substance,
87 that on October 7th, 1891, the collateral notes in suit were entered up in the "Bills Receivable" register of the defendant bank; that he did not see plaintiff personally in regard to the sale of the notes prior to that time, but had correspondence
88 with, him as detailed. He admitted the sending of the letters of Sept. 14th and Oct. 7th, 1891, and receiving the telegram of Oct. 5th, 1891. He testified he had "no recollection" of sending the telegram of October 3rd, 1891, but admitted that he had made a copy of it from some place "to keep the chain of correspondence up." [On former trials, however, he admitted sending this telegram. Under Chap. 15, of the 1897 Session

Laws of N. Dak., §2, Subd. 13, our Courts take judicial notice of all prior proceedings in the case pending.] 89

Defendant's cashier also produced on the trial the two last of the series of seven notes, and testified that the others had been paid.

On February 3rd, 1897, a verdict was directed and found in favor of plaintiff below for $1705.85.

On June 3rd, 1897, judgment was duly entered for $1914.40, amount of verdict, interest and costs. 90

On July 17th, 1897, defendant below appealed to the Supreme Court of the State of North Dakota.

On October 4th, 1897, said Supreme Court affirmed the judgment of the district court.

91

OPINION OF SUPREME COURT OF NORTH DAKOTA.

Extracts from the opinion of the Supreme Court of the State of North Dakota, handed down in rendering the judgment affirming the judgment of trial court, are cited in our brief on this motion,—to the effect that the Court would 92 have arrived at the same conclusion at which it did arrive, even had it conceded the contention of plaintiff in error, [defendant below], on the Federal question sought to be raised.

Anderson vs. Bank, 72 N. W. Rep., [N. Dak.,] 916-921.

93 IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA,

ALEXANDER ANDERSON, PLAINTIFF AND RESPONDENT,

vs.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, DEFENDANT AND APPELLANT.

PETITION FOR WRIT OF ERROR.

94 And now comes the defendant and appellant herein, the First National Bank of Grand Forks, North Dakota, and says: that on or about the 13th day of October, 1897, this court entered judgment herein in favor of the plaintiff and against the defendant, The First National Bank aforesaid, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of
95 this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE the defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a tran-
96 script of the record, proceedings and papers in this cause duly authenticated, may be sent to said Supreme Court of the United States, and that a supersedeas may be allowed upon lodging with the Clerk of this Court its bond according to law therefor.

Dated at Grand Forks, North Dakota, October 16th, 1897.

W. E. DODGE and BURKE CORBET,
Attorneys for Defendant and Appellant.

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA, 97

ALEXANDER ANDERSON, PLAINTIFF AND RESPONDENT,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, DEFENDANT AND APPELLANT.

At Law.

ASSIGNMENT OF ERRORS.

The defendant in this action, the First National Bank of Grand Forks, North Dakota, 98 in connection with its petition for a writ of error makes the following assignment of errors, which it avers occurred upon the trial and determination of the cause in this, the Supreme Court of the State of North Dakota, to-wit:

I.

The court erred in denying the defendant's assignments of errors committed by the district court of North Dakota upon the trial of said 99 cause in said district court in the admission of plaintiff's evidence, and wherein this court erroneously ruled and adjudged that the district court did not err in the admission of such evidence in the following instances, to-wit:

(1) In assignment of error Number One (1) that the district court erred in overruling and denying defendant's objection made at the first offer of evidence in behalf of the plaintiff, where- 100 in defendant objected to the introduction of any evidence on behalf of the plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the district court, and exceptions to such rulings were duly taken, allowed and preserved, and which ruling is affirmed by

101 this, the Supreme Court of North Dakota. The complaint stating a pretended cause of action which on the face thereof was based upon a pretended contract on the part of the defendant bank, which by the statutes of the United States was not within the power of a national bank to make, and upon the face thereof was ultra vires and void.

102 (2) In assignment of error Number (50), that the district court erred in overruling and denying defendant's objection to Exhibit "E," the letter dated Grand Forks, September 14th, 1891, addressed to Mr. Alexander Anderson, Seattle, Wash., and signed S. S. Titus, Cr., wherein is contained the pretended offer to act as agent in 103 the following words: "If I had basis to work on I might find someone who would take the paper. You offered it at $350.00 discount, we offered you a trade at $1000.00 discount. Now if you will make it $700.00 or $800.00 and allow us a small commission, I will try and place the paper for you." Which ruling by the district 104 court was affirmed by this, the Supreme Court of North Dakota, although the contract sought to be established thereby was one which under the National Bank Act, a statute of the United States was not within the powers of a national bank to make, or to perform, and was ultra vires and void, and under such statute it was not within the powers of a cashier of a national bank to bind his bank by contract to assume the duties and obligations

of an agent for the sale of notes and mortgages to third persons, and the act of the cashier in writing such letter was ultra vires and void. 105

(3) In assignment of errors Number Seventy-Four (74) concerning like objections to the introduction in evidence of the same letter as exhibit Eleven (11) upon identification thereof by the witness, S. S. Titus.

(4) In assignment of error Number Ninety (90) wherein the district court erred in overruling and denying defendant's motion to strike out the letter of September 14th, 1891, being exhibit "E" and also identified as exhibit "11" as above stated, on the ground that it was ultra vires and also not shown to have been the act of the defendant bank, which erroneous ruling was affirmed by this, the Supreme Court of North Dakota, although the contract of agency held by this court to be established thereby was as the contract of a National Bank ultra vires under the National Bank Act, and the act of the cashier in undertaking to bind his bank by such contract was ultra vires under said act. 106 107

(5) In assignment of errors Nunmber One Hundred and Forty-Seven (147) concerning the admission of said letter, Exhibit "E" admitted over defendant's objections and the admission adjudged to be proper by this Court. 108

(7) In assignment of errors Number One Hundred and Forty-Five (145) wherein defendant assigned error in admitting evidence of the pretended telegram of October 3rd, 1891, as fol-

109 lows: "Did you receive our letter Sept. 14. Wire us your best offer so we can advise a party who said he would hold his money until we heard from you. First National Bank." Upon the ground that there was no evidence of the identity or authority of the writer or sender, if any, and the agency if established was ultra vires, and the act of any officer contracting that the bank would
110 act as agent would be ultra vires, which express claim for immunity against liability both on account of ultra vires acts of the cashier, and also on account of ultra vires contracts by the bank itself was by this Supreme Court of North Dakota erroneously denied.

II.

The court erred in denying defendant's as-
111 signments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the rejection of evidence offered by the defendant which erroneous rulings were affirmed and sustained by this, the Supreme Court of North Dakota, which court erroneously denied defendant a reversal of the judgment of
112 said district court, and erroneously affirmed said judgment against defendant in said action, notwithstanding such errors by the court below, and that the said erroneous rejection of evidence was in the following instances, to-wit:

(1) In assignment of error Number One Hundred and Twenty-three (123) wherein J. Walker Smith, President of the Board of Directors of the defendant bank, was produced, sworn and

examined as a witness on behalf of the defendant and shown competent to testify to the facts, and was asked on behalf of the defendant: "Did the board of directors of the defendant bank in any way ever authorize Mr. Titus to act for and on behalf of the bank constituting the bank thereby the agent of the the plaintiff for the sale of the notes in litigation?" Which question was objected to by the plaintiff on the ground that it was incompetent, irrelevant and immaterial, which objection was erroneously sustained by the district court, and exceptions to such ruling were duly taken, allowed and preserved, and duly submitted to this, the Supreme Court of the State of North Dakota, wherein such ruling was erroneously affirmed and judgment rendered against defendant, notwithstanding such error, though under the statutes of the United States, the cashier, Titus, could not render defendant liable as agent by his acts without such express authority, and any act on the part of such cashier attempting to contract for or on behalf of the bank that it would assume or undertake any of the duties, obligations or liabilities of plaintiff's agent for the sale of said notes to third parties, if established. was ultra vires and void. 113 114 115 116

(2) In assignment of errors Number One Hundred and Twenty-four (124) wherein defendant offered to prove by said witness, J. Walker Smith, that the defendant bank did not in any way either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the defendant bank, constitut-

117 ing the bank the agent of plaintiff for the sale of the seven promissory notes in litigation, which evidence the district court erroneously excluded upon plaintiff's objection that it was irrelevant, incompetent and immaterial, to which ruling exceptions were duly taken, allowed and preserved, and duly submitted to this, the Supreme Court of North Dakota, wherein said ruling was erroneously affirmed, and judgment has been erroneously rendered and entered against defendant notwithstanding such error, although it manifestly appeared that such ruling was in conflict with the statutes of the United States, and denied to defendant a right, privilege and immunity claimed br defendant under such statutes that it should not be liable for ultra vires acts of its cashier.

118

119 (3) In assignment of errors Number One Hundred and Twenty-five (125) wherein defendant offered to prove by said witness, J. Walker Smith, that the board of directors of the defendant bank never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, the agent of the plaintiff for the sale of the seven promissory notes, which evidence was erroneously excluded by the district court upon the same objections and such ruling duly presented to this, the Supreme Court of North Dakota, was erroneously affirmed and judgment erroneously entered, though such ruling erroneously denied a right privilege and immunity ex-

120

pressly claimed by the defendant under the National Bank Act, a statute of the United States. 121

(4) In assignment of error Number One Hundred and Fifty-Four (154) wherein defendant assigned as error that the district court erred in excluding the testimony of J. Walker Smith that no authority was conferred upon any officer to, nor was any steps taken whereby the defendant bank could engage to act as agent for the sale of 122 these notes, or otherwise, because any contract to that effect is ultra vires, and not within the implied or customary powers of officers of a national bank, which claim from immunity from ultra vires acts of its officers, and from liability on account of ultra vires contracts by national banks themselves thus expressly set up was erroneously denied by this Supreme Court of North Dakota. 123

III.

The Supreme Court of the State of North Dakota erred in denying to defendant the immunity conferred upon defendant as a national bank by the statutes of the United States that it should not be liable on account of ultra vires acts of its cashier, and not even by ultra vires contracts by the bank itself, which immunity was expressly 124 claimed by defendant in the district court wherein the case was tried, and in this, the Supreme Court of said State when brought here upon appeal, and in the following instances, to-wit:

(1) In assignment of errors Number One Hundred and Fifty-Six (156) wherein defendant assigned as error that the district court erred

125 in directing a verdict for plaintiff for the amount directed, or for any amount, which ruling was affirmed by this, the Supreme Court of North Dakota, although the verdict was based upon a complaint which set up a cause of action solely upon an ultra vires contract, and was supported if at all, only by evidence of such ultra vires contract, made by defendant's cashier without authority.

126 [2] In assignment of errors Numbered Third [III] of the assignments of errors annexed to and written out at length at the close of defendant's brief, wherein defendant assigned error as follows: "Appellant" [this defendant] "further says there was manifest error" [by the district court] "in rendering judgment against appellant in this action for each of the following reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the
127 United States to national banks against liability on account of ultra vires acts of their officers and ultra vires contracts of the banks themselves." Which erroneous judgment was eroneously affirmed by this, the Supreme Court of North Dakota, notwithstanding such claim and right to immunity under the statutes of the United States.

IV.

128 The Supreme Court of North Dakota manifestly erred in denying to defendant, by giving judgment against it, the immunity claimed and set up by the defendant under the statutes of the United States against liability on account of ultra vires acts of its cashier, and ultra vires contracts by the bank itself, whereon alone judgment was demanded and rendered.

V.

The Supreme Court of North Dakota erred in denying defendant's petition for a rehearing

upon the ground that such court had overlooked and disregarded the record and the law applicable thereto in relation to the want of power or authority of the cashier of a national bank to bind his bank by contract to assume the duties and responsibilities as an agent for plaintiff to sell the notes and mortgage for plaintiff to a third person. Also that this court overlooked and disregarded the record and the law applicable thereto in relation to the power of a national bank itself in any manner by contract to assume the duties and responsibilities of such agent, and has thereby denied defendant a right, privilege and immunity claimed by it under the statutes of the United States. 129 130

Dated, Grand Forks, North Dakota, October 18th, 1897.

W. E. DODGE and BURKE CORBET, 131
Attorneys for Defendant,
First National Bank of Grand Forks,
North Dakota.

WRIT OF ERROR.

United States of America, ss.

The President of the United States of America.

To the Honorable Judges of the Supreme Court of the State of North Dakota, 132

GREETING; Because in the records and proceedings, as also in the rendition of the judgment on a plea which is in the said Supreme Court of the State of North Dakota before you, or some of you, being the highest court of law or equity of the said State of North Dakota in

which a decision could be had in said suit between Alexander Anderson and First National Bank of Grand Forks, North Dakota, wherein was drawn in question the validity of a treaty or statute or of an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said First National Bank of Grand Forks, North Dakota, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, by the 5th day of January, A. D., 1898, in the said Supreme Court, to be then and there held,

that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done. 137

WITNESS THE HONORABLE MELVILLE W. FULLER, Chief Justice of the said Supreme Court, the Sixth day of November, in the year of our Lord One Thousand Eight Hundred and Ninety-Seven. 138

J. A. Montgomery,
Clerk of the Circuit Court
(Seal of the) of the United States, for
(Circuit Court.) the District of North
Dakota.

Ailowed by Guy C. H. Corliss,
Chief Justice of the Supreme
Court of the State of 139
North Dakota.

No. 557

In The Supreme Court of THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Jan. 10, 1898.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error,

vs.

ALEXANDER ANDERSON,

Defendant in Error.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

PHELP & PHELPS,
ATTORNEYS FOR DEFENDANT IN ERROR,
Grafton, North Dakota.

BATES THE PRINTER, GRAFTON, N. D.

In The Supreme Court of

THE UNITED STATES,

OCTOBER TERM, 1897.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

In order for the Supreme Court of the United States to acquire jurisdiction under §709 U. S. R. S., the decision of the Federal question must 4
appear to have been necessarily involved in the determination arrived at in the State Court; (Armstrong vs. Treasurer, 16 Peters, 281; Mills vs. Brown, 16 Peters, 525), so that the State Court could not have given a judgment without deciding it; (Parmelee vs. Lawrence, 11 Wall. 36; affirming R. R. Co. vs. Rock, 4 Wall., 177;

5 Gill vs. Oliver, 11 How., 529; Millingar vs. Hartupee, 6 Wall., 258; Fowler vs. Lamson, 17 S. Ct. Rep., 112.)

Where the decision is made in the State Court on settled pre-existing rules of general jurisprudence, the case cannot be brought here for review. (Bank of West Tennessee vs. Citizens' Bank, 14 Wall., 9; Palmer vs. Marston,
6 14 Wall., 10.; Sevier vs. Haskell, 14 Wall., 12; Delmas vs. Ins. Co. 14 Wall., 661; C. & N. W. Ry. Co. vs. City of Chicago, 17 S. Ct. Rep., 129, decided Nov. 30th, 1896.)

In the case at bar, the assignments of error alieged by plaintiff in error all center at one point, viz, that under the statutes of the United States relating to national banks, it was not with-
7 in the power of plaintiff in error to become the agent of defendant in error to sell the seven promissory notes in suit to a third person, even though the evident object of such sale was to apply the proceeds of this sale of the collateral paper, first to the payment of the two thousand
8 ($2000) dollar loan made by the bank to Mr. Anderson, and second, for the bank to remit to Mr. Anderson the balance. The assignments of error also allege that that under such statutes, it was not within the powers of the cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgages to third persons.

We contend that the decisions of the State Courts upon these questions, in the case at bar,

were not necessarily involved in the determination at which they arrived. Our complaint alleges, Paragraph 4, that the seven notes in suit were deposited by Mr. Anderson with the bank as collateral security for the $2000.—loan which had been made to him by the bank. This allegation is admitted by paragraph four (4) of defendant's answer. We further allege in our complaint (Par 6) that the defendant below wrongfully converted the notes to its own use. The evidence fully substantiates this allegation. The Supreme Court of the State of North Dakota holds in its opinion on the fourth appeal (72 N. W. Rep. 916-921) as follows:—"The question of ultra vires has been already discussed in a previous opinion. See 67 N. W., 821. We have nothing to add on that point, except that *the question appears to us to be immaterial.* The plaintiff, when it authorized a sale by defendant as its agent, did, in contemplation of law, decline to sell to the agent on the terms agreed, or any terms; there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always, in contemplation of law, is in the attitude of being unwilling to sell to the agent on any terms. Whether the defendant was authorized by the law to act as agent for the plaintiff *is therefore of no moment*, because, even if we concede this proposition, it still remains true that he has never agreed to a purchase of the notes by the defendant; and hence it follows that the defendant's assumption of ownership of them, as

though plaintiff had assented to a purchase of them by defendant, constituted a conversion thereof. * * * What we said in our opinion on the third appeal on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the record now before us. *In its answer* and the brief of its counsel the defendant admits that the writing of the letters referred to was *its* act, and not the act of an authorized agent. By its own pleading and admission it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

It readily and very manifestly appears, therefore, that the judgment of the State Court was not based upon the decision of either of the two propositions relied upon by plaintiff in error in its assignments of errors. The decision of no Federal question was necessarily involved in the judgment at which the State Court arrived.

The case was disposed of on general principles of law. The notes in suit had been left with the defendant bank as collateral security. The bank, without leave of plaintiff, entered them up in its "Bills Receivable" register, as its own property, on October 7th, 1891, and has exercised acts of ownership over them ever since, having collected five of the notes as its own property. This certainly constituted a conversion of the paper, and rendered it liable to Mr. Anderson for the value thereof. Whether the correspondence be-

tween the parties did or did not create the relation of principal and agent between them, whether the bank did or did not have power to act as Mr. Anderson's agent, and whether the cashier did or did not have power to bind his bank by contract to assume such agency,—the fact still remains that the bank did convert the collateral notes in suit, and upon this conversion, the judgment of the court below was based, irrespective of the question of *ultra vires.*

On a motion of this nature, when the case has manifestly been decided right in the court below, the writ of error should be dismissed and the judgment below affirmed, and the case ought not to be held for further argument.

(Arrowsmith vs. Harmoning, 118 U. S., 194; Church vs. Kelsey, 121 U. S., 282.)

We believe, under the circumstances of this case, we are justified in asking that damages of ten per cent upon the amount of the judgment, as mentioned in Rule 23 of this Court, be awarded to defendant in error, as well as costs of this motion. The original action was commenced nearly five years ago. It has already been passed upon on four appeals, a new trial having been awarded plaintiff below, on each of the first three appeals. The rate of interest in the notes converted was nine per cent per annum, while the legal interest recoverable in this action is but seven per cent.

(See Anderson vs. Bank, 72 N. W. Rep., 916-918.)

The language of the Supreme Court of North Dakota on the last appeal was explicit in stating

that it would have arrived at the same conclusion at which it did arrive, even had it conceded the contention of plaintiff in error on the Federal question sought to be raised. Plaintiff in error must have known this before it sued out the writ of error which brought the case here; but it has brought the case to this court in spite of the immateriality of the Federal question,—apparently for delay only; and we therefore believe, in view of all the circumstances, defendant in error should be awarded the damages mentioned, as well as a dismissal of the writ and an affirmance of the judgment below.

Respectfully submitted,

December 15th, 1897.

PHELPS & PHELPS,

Attorneys for Defendant in Error,

Grafton, North Dakota.

In The Supreme Court of [1]
THE UNITED STATES.

OCTOBER TERM, 1898.
NO. 223.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, [2]

PLAINTIFF IN ERROR,

vs.

ALEXANDER ANDERSON,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF [3] THE STATE OF NORTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS AND AFFIRM.

This case presents the singular aspect of plaintiff in error, (defendant below,) attempting to avoid liability to defendant in error for the value

of certain collateral notes, belonging to defendant in error, converted by plaintiff in error,—the sole contention of plaintiff in error in this court being that it had not, as a national bank, power to convert the notes, because it had not power to act as agent for defendant in error in a certain proposed sale of the notes by the bank as Anderson's agent. In other words, conceding as we must, that the decision of the highest court of North Dakota was correct, if we regard the plaintiff in error as a natural person instead of a national bank, and that there was a conversion of Anderson's notes by the bank, because the bank, assuming to act as his agent in the sale of the notes to a third person for him, sold the notes to itself in violation of its duty as his agent,—the bank, plaintiff in error, now comes to this court, seeking to take advantage of its own wrong, by urging that what would have been wrong for a private individual to commit was right because committed by a national bank.

ALLEGED FEDERAL QUESTION IMMATERIAL.

In order for the Supreme Court of the United States to acquire jurisdiction under § 709, U. S. R. S., the decision of the Federal question must appear to have been NECESSARILY INVOLVED in the determination arrived at in the State Court; (Armstrong vs. Treasurer, 16 Peters, 281; Mills vs.

Brown, 16 Peters, 525,) so that the State Court could not have given a judgment without deciding it; (Parmelee vs. Lawrence, 11 Wall. 36; affirming R. R. Co. vs. Rock, 4 Wall. 177; Gill vs. Oliver, 11 How. 529; Millingar vs. Hartupee, 6 Wall. 258; Fowler vs. Lamson, 17 S. Ct. Rep. 112.) 8

Where the decision is made in the State Court on settled pre-existing rules of general jurisprudence, the case cannot be brought here for review. (Bank of West Tennessee vs. Citizen's Bank, 14 Wall. 9; Palmer vs. Marston, 14 Wall. 10; Sevier vs. Haskell, 14 Wall. 12; Delmas vs. Ins. Co., 14 Wall. 661; C. & N. W. Ry. vs. City of Chicago, 17 S. Ct. Rep. 129.) 9

10

In the case at bar, the assignments of error alleged by plaintiff in error, (folios 65–71 Agreed Record,) all center at one point, viz: That under the statutes of the United States relating to national banks, it was not within the power of plaintiff in error to become the agent of defendant in error to sell the seven promissory notes in suit to a third person, even though the evident object of such sale was to apply the proceeds of this sale of the collateral paper, first to the payment of the two thousand ($2,000.00) dollars loan made by the bank to Mr. Anderson, (the bank simply collecting its own paper, through this method,) and second, for the bank to remit Mr. Anderson the 11

12 balance. The assignments of error also allege that under such statutes, it was not within the power of the cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgages to third persons.

We contend that the decisions of the State
13 Courts upon these questions, in the case at bar, were not necessarily involved in the determination at which they arrived. Our complaint alleges, paragraph 4, (folio 3 Agreed Record,) that the seven notes in suit were deposited by Mr. Anderson with the bank as collateral security for the $2000,—loan, which had been made to him by the
14 bank. This allegation is admitted, by paragraph 4 of defendant's answer, (folio 6, Agreed Record.) We further allege in our complaint, (paragraph 6,) that the defendant below wrongfully converted the notes to its own use. The evidence fully substantiates this allegation, as we shall point out later in this brief.

15 OPINION OF NORTH DAKOTA SUPREME COURT.

The Supreme Court of the State of North Dakota holds in its opinion on the fourth appeal (72 N. W. Rep. 916–921,) as follows: (folios 57–8 Agreed Record:) "The question of ultra vires has been already discussed in a previous opinion. See 67 N. W. 821. We have nothing to add on that

point, except that THE QUESTION APPEARS TO US 16
TO BE IMMATERIAL. The plaintiff when he authorized a sale by defendant as his agent, did, in contemplation of law, decline to sell to the agent on the terms agreed, or any terms; there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always, in contemplation of law, is in the attitude of be- 17
ing unwilling to sell to the agent on any terms. Whether the defendant was authorized by the law to act as agent for the plaintiff IS THEREFORE OF NO MOMENT, because, even if we CONCEDE this proposition, it still remains true that he has never agreed to a purchase of the notes by the defendant; and hence it follows that the defendant's 18
assumption of ownership of them, as though plaintiff had assented to a purchase of them by defendant, constituted a conversion thereof. * * * What we said in our opinion on the third appeal on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the 19
record now before us. IN ITS ANSWER AND THE BRIEF OF ITS COUNSEL the defendant admits that the writing of the letters referred to was ITS act, and not the act of an unauthorized agent. By ITS OWN PLEADING AND ADMISSION it has precluded itself from raising the point that the cashier had

20 no power to bind it by agreeing that the bank would act as agent for the plaintiff."

It readily and manifestly appears, therefore, that the judgment of the State Court was not based upon the decision of either of the two propositions relied upon by plaintiff in error in its assignments of error. The decision of no Federal
21 question was necessarily involved in the judgment at which the State Court arrived.

The case was disposed of on general principles of law. The notes in suit had been left with the defendant bank as collateral security. The bank, without leave of plaintiff, entered them up in its "Bills Receivable" register, as its own property,
22 on October 7th, 1891, (folio 22,) and has exercised acts of ownership over them ever since, having collected five of the notes as its own property. (Folio 33.) This certainly constituted a conversion of the paper, and rendered it liable to Mr. Anderson for the value thereof. Whether the correspondence between the parties did or did not create the relation of principal and agent between
23 them, whether the bank did or did not have power to act as Mr. Anderson's agent, and whether the cashier did or did not have power to bind his bank by contract to assume such agency,—the fact still remains that the bank did convert the collateral notes in suit, by entering them up as its own, and by collecting them as its own, and upon this conver-

sion the judgment of the court below was based, 24
irrespective of the question of ULTRA VIRES.

Under § 709, U. S. R. S., in a case of this nature, it is only where the decision of the State Court is AGAINST the immunity claimed that the judgment "may be re-examined and reversed or affirmed in the Supreme Court upon writ of error." Therefore, in the case at bar, where our State Supreme 25
Court deemed the question of ULTRA VIRES "immaterial" and "of no moment," and that Court expressly conceded the position of plaintiff in error for the sake of the argument, (folios 57–8 Agreed Record,)—and still arrived at the same decision in the case, it follows that the case at bar does not come within the terms of § 709, U. S. R. S., which 26
contemplates the decision of the State Court to be AGAINST the immunity set up by the party. Its status is precisely the same as though the Federal question had been determined in favor of, instead of AGAINST, the plaintiff in error,—in which case the judgment of the State Court cannot be re-examined on writ of error.

27
The settled policy of the United States Supreme Court appears to have been to take cognizance of such cases only where the decision of the Federal question appears to have been NECESSARILY INVOLVED in the determination arrived at in the State Court.

To say that the question of ultra vires was

28 necessarily involved in the decision of the case at bar, when our State Court deemed it "immaterial" and "of no moment," is certainly a solecism. The Court decided the case on other points of law, as well, involving no Federal question, and its decision on such other points is necessarily final, where it conceded the position of plaintiff in error on the
29 only Federal question involved, as it did, for the sake of the argument. It follows that the writ of error should be dismissed and the judgment below affirmed.

II.

QUESTION MANIFESTLY DECIDED RIGHT.

On a motion of this nature, when the case has
30 manifestly been decided right in the Court below, the writ of error should be dismissed and the judgment below affirmed, and the case ought not to be held for further argument. (Arrowsmith vs. Harmoning, 118 U. S. 194; Church vs. Kelsey, 121 U. S., 282.)

AGENCY ADMITTED IN BOTH PLEADINGS
31 OF PLAINTIFF IN ERROR.

Bearing in mind that the only question sought to be brought before this Court by plaintiff in error is the question of agency, let us examine its pleadings in this case upon that point. In those pleadings, its attorney of record represents the bank, as a corporation, not any particular officer

of the bank. The answer of the defendant is its 32
answer as a corporation; and the solemn admissions of record of the attorney, in defendant's answer, are the admissions of the bank itself. Having pleaded its agency for Mr. Anderson, or facts from which an agency is irresistibly inferred, it cannot deny such agency. In this connection we refer to paragraph VI of the amended answer 33
of plaintiff in error. (See folios 6 and 7, Agreed Record.) In its pleading, it admits that it charged Mr. Anderson $35.00 as a "commission for selling the paper." This idea of a COMMISSION charged is inseparable from the idea of an agency.

What does the word "commission" mean? Webster defines it as "a brokerage or allowance made to a factor or agent for transacting business for 34
another."

Not only in its amended answer, but in its original answer, defendant, (now plaintiff in error,) pleaded its own agency for Mr. Anderson. This appears affirmatively in the present Agreed Record (folio 53,) wherein our Supreme Court reviews the case as follows:—"In the original complaint the 35
question of agency was involved as the very basis of the action. * * * THE DEFENDANT ADMITTED THE AGENCY. * * * So far as the question of agency is concerned, the complaint stands unchanged." The fact that the original answer has been amended cannot change the effect of the estoppel created by this admission of record of

plaintiff in error in its pleading. An admission of a party, even in a superseded pleading, still has its binding effect. (Gale vs. Shillock, 29 N. W. Rep. (Dak.) 661; Carr vs. Huffman, (Kan. App.) 41 Pac. Rep. 982; Bank vs. Gilman, (S. Dak.) 52 N. W. Rep. 869–871; Myrick vs. Bill, (Dak.) 17 N. W. Rep. 268.) Under the statutes of North Dakota, it is not necessary to introduce the superseded pleading in evidence, for our courts must take judicial notice of all prior proceedings in the case pending; (see N. Dak. Session Laws of 1897, chapter 65, § 1, Subd. 13,) and this is the common law rule even in the absence of statute. (12 Am. and Eng. Ency. of Law, 184.)

THIS AGENCY MANIFESTLY NOT ULTRA VIRES.

Under § 5136 U. S. R. S., a national bank may exercise (not only by its board of directors, but also by its AUTHORIZED OFFICERS OR AGENTS) "all such INCIDENTAL POWERS as shall be necessary to carry on the business of banking," by loaning money, etc., and by negotiating promissory notes, etc.

Under this section, it must be conceded that plaintiff in error had power to collect the money owing to it on the $2000.00 loan which it had made to Mr. Anderson. The very purpose of the bank, in taking the $7000.00 of collateral notes in

the first place, was to secure or enforce payment 40
of the principal $2000.00 note, if required, in order in obtain the money due on its loan made to Mr. Anderson.

This transaction was directly in the line of the banking business, and is certainly one of the incidental powers of a bank, reasonably and necessarily so, in order to do business at all. 41

Plaintiff, as his own note was approaching maturity, authorized defendant to sell the paper to a third person unknown to him, and to use the proceeds, first, to pay his own $2,000.00 note to the defendant, and next to remit the balance to him. The defendant was instructed to do this at plaintiff's instance. It was acting under plaintiff's 42
instructions. It was his agent for this particular purpose. Being a corporation, it could only so act through its officers or agents.

The proposed sale did not contemplate the bank entering into the GENERAL BUSINESS of agency to sell notes on commission for one who was not already a customer of the bank, but this whole 43
transaction was simply an incidental matter to the collection of the bank's own paper, clearly appearing under the bank's incidental powers,—the evident object of the transaction being that from the proceeds of this proposed sale, Mr. Anderson could thereby pay his own $2000.00 note to the bank.

44 But instead of selling the paper to a third person, as authorized, and applying the proceeds as authorized, defendant converted the paper to its own use, by entering it up as its own and collecting it as its own. Plaintiff's telegram of October 5th, 1891, replying to that of October 3rd, 1891, (folio 26, Agreed Record,) which "kept
45 the chain of correspondence up," (folio 27,) being Exhibits "12" and 13," which the Agreed Record, at folio 29, shows were received in evidence, was followed by the defendant bank entering up the notes as its own property in its "Biils Receivable" register October 7th, 1891, (folio 22.) And defendant wrote plaintiff on October 7th, 1891, pretending it had sold the paper to a third
46 person, and charging a commission of $35.00 for it, as though such sale had actually been made (folios 6–7.)

Must the cashier be authorized by defendant's board of directors to receive the payment of the $2000.00 loan, before he could legally receive such payment?

47 While it is not our purpose on the argument of this motion to discuss the evidence as to agency as thoroughly as we would on the general merits of the case, we may refer the Court to the letter of plaintiff in error, dated September 14th, 1891, appearing at folios 19–20, Agreed Record, wherein it proposed to "place the paper" for defendant in error, if he would allow "a small commission,"

and wherein it also contemplated selling the paper 48
to some capitalist, and also mentioned that it would "go to work" for defendant in error. This letter of Sept. 14th, in connection with the telegrams of October 3rd and October 5th and the letter of October 7th, would appear to leave no doubt as to the intention of the parties being that the bank was to act as Anderson's agent in sell- 49
ing the notes in question to a third party.

The reasoning of the Supreme Court of North Dakota in its opinion on the third appeal (see 67 N. W. Rep. 821–3 referred to in the stipulation at folio 74 of the Agreed Record,) appears sound, wherein it decides that "as an incident of the conceded power of the bank to realize on security it 50
held, it had power to act as agent for plaintiff in effecting a sale thereof," and "To deny to a national bank large INCIDENTAL POWERS in the enforcement of such claims, would be seriously to hamper and cripple them, and this too, without necessity, and in the face of general principles."

Our state Supreme Court further holds (p. 824,) 51
that "it was within the ordinary powers of the cashier, as the financial officer of the bank, charged with the custody and control of its funds, AND THE COLLECTION OF ITS CLAIMS, to enter into this arrangement on behalf of the bank, that the bank should act for plaintiff in the sale of these notes;" and further, on p. 824;—"Moreover, the DEFEND-

52 ANT has deliberately set up in ITS ANSWER that these letters and telegrams were sent out and received BY THE BANK ITSELF. There is no attempt to claim that the dealings were had with the cashier, and that he was not authorized to enter into them on its behalf. The DEFENDANT, in specific language, avers that whatever was done in the matter was done BY THE BANK ITSELF. By
53 defendant's own amended answer, therefore, the question of the power of the cashier is eliminated from the case."

That part of the decision of the highest Court of North Dakota last referred to does not present a Federal question. It presents simply a question of construing a pleading, upon which the judgment
54 of the highest State Court should be final, and especially as a decision upon code pleading, which prevails in our state.

In the same opinion, p. 822, (THIRD APPEAL) the Court further states:—"The defendant, by its amended answer, NOW FOR THE FIRST TIME asserts that it was not acting as agent, did not intend to
55 act as agent," etc. * * * "At all times up to the period when the defendant's answer was amended, it had CONCEDED THAT IT WAS AGENT, and it defended the case solely on the ground that it had accounted for and paid over to plaintiff all the net proceeds of the sale effected by it AS SUCH AGENT. The agency was, in effect, admitted in

the original answer. It formed the corner stone 56
of defendant's argument in this Court on the first appeal, and was not questioned by defendant's counsel in brief or oral argument on the second appeal. * * * Defendant has estopped itself by its own solemn admission from raising the point."

DOCTRINE OF ULTRA VIRES HAS NO AP- 57
PLICATION TO TORTS COMMITTED BY A CORPORATION.

Our amended complaint is based primarily upon the conversion of plaintiff's collateral notes by the defendant bank. Although the tort is waived (par. 8) for the sole purpose of maintaining this action as a suit in assumpsit, "the tort itself, so 58
far as it gives rise to a cause of action, is not forgiven." That is the decision of our State Supreme Court in this case, and as it raises no Federal question, (being simply a question of construing a pleading under the code,) such decision is final. (67 N. W. Rep. 821–4.)

The fact that plaintiff in error, immediately following the telegrams, entered up the collateral 59
notes as its own property, and collected them as its own, WITHOUT LEAVE OF DEFENDANT IN ERROR, (his only permission being to sell to a THIRD PERSON,) establishes a conversion of the notes by the bank, without regard to the question of agency at all. Whether or not this conversion was the con-

60 version set out in the complaint is immaterial, and this under an express Statute of the State of North Dakota, being § 5482, of the 1895 Revised Codes of N. Dak., as follows:—"§ 5482. The relief granted to the plaintiff, if there is NO ANSWER, 'cannot exceed that which he shall have demanded in his complaint; but in any other case the Court
61 may grant him relief consistent with the case made by the complaint and embraced within the issue."

In such case, our Supreme Court treats the complaint amended, to conform to the proof. Ashe vs. Beasley, (N. Dak.) 69 N. W. Rep. 188–191. To cut off the power to amend to conform
62 to the proof, it is not enough that the cause of action is different. The claim itself must be changed, and that, too, in a substantial way." Anderson vs. Bank, (2nd appeal,) 64 N. W. Rep. (N. Dak.) 114–117.

This being established, what is the effect of the doctrine of ultra vires, as applied to torts committed by a corporation?
63

We cite the following, from the Amer. & Eng. Ency. of Law, Vol. 27, p. 393:—"It is true that every tort committed by a corporation involves an unauthorized exercise of corporate power, but this is no reason why the corporation should not be held responsible for the consequences. * * * Corporations are held liable to the same extent,

and under the same circumstances, for the conse- 64
quences of their wrongful acts, as natural persons."

And again, p. 394:—It is no defense to an action of tort against a corporation that the tort was committed while transacting a business without and beyond the purview of the corporate authority and purposes, if the corporation in any clear and 65
explicit manner recognized the business as its own, as by employing agents to superintend it, OR RECEIVING THE PROFITS ARISING THEREFROM."

Again, in foot-note, p. 394:—"While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technichally ultra vires, it is well established that corporations may commit almost every kind of tort, 66
and be liable to an action for the same. In such case, the doctrine of ultra vires has no application." Central R. etc. Co. vs. Smith, 76 Ala. 582, 52 Am. Rep. 353; Mer. Nat. Bank vs. State Nat. Bank, 10 Wall. 604.

LAW OF THE CASE.

67
"The records on a former appeal in the same action may be looked into for the purpose of ascertaining what facts and questions were then before the Court, so as to see to the correct application of this rule that such decision is the law of the case. * * * The facts being found to be the same, the rule applies that a decision of the

Supreme Court in a given case becomes the law of the case in all of its subsequent stages, and will not be reviewed when the case comes up on a second appeal, the facts being the same." (Plymouth County Bank vs. Gilman, (S. Dak.) 52 N. W. Rep. 869–71, and cases cited; Scottish–American Mortg. Co. vs. Reeve, (N. Dak.) 75 N. W. Rep. 910. The Supreme Court of Wisconsin tersely states the rule as to the binding force of a decision on a former appeal thus:—"Though erroneous, it must stand as the law of this case." (Everett vs. Gores, (Wis.) 66 N. W. Rep. 616.)

And this is only a fair and reasonable rule. In the case at bar, the Supreme Court of North Dakota decided on four separate appeals in this case that the relation between the plaintiff and defendant was that of principal and agent. (Folios 47 and 74, Agreed Record.) Good faith towards defendant in error would have demanded that if plaintiff in error intended to raise the alleged Federal question at all, it should have done so a long time prior to the third or fourth trial of the case, and that inasmuch as it did not then raise the Federal question, that the same has long since been waived.

Plaintiff in error has brought here only the record on the fourth appeal, and although the stipulation at folio 74 of the Agreed Record, includes the consideration by this Court of the

reported decisions of the Supreme Court of North 72
Dakota in the case of Anderson vs. Bank, still plaintiff in error has not brought here any record of its objections, showing any Federal question raised upon any former trial, and especially not upon the first and second trials. It is elementary that plaintiff in error, in order to reverse the judgment, has the burden to affirmatively show error; 73
and this it cannot do in the case at bar, without showing that it expressly claimed the protection of some "title, right, privilege or immunity specially set up or claimed" by it under the constitution or statutes of the United States, (C. & N. W. R. Co. vs. Chicago, 17 Supr. Ct. Rep. 129,) and this, too, before our Supreme Court decision 74
on the question of agency had become the settled law of the case on the second trial. That the evidence on the third trial was identical with that of the second trial, as far as the question of agency was concerned, is amply proven by the language of our Supreme Court on the third appeal in Anderson vs. Bank, 67 N. W. Rep. 822, (referred to in our stipulation) as follows: "The facts are 75
precisely the same as they were when this case was before us the last time."

Did plaintiff in error, prior to the third trial, even attempt to raise the Federal question, which it now attempts to raise? No! The language of our State Supreme Court on the third appeal is

emphatic on this point, as follows, (67 N. W. Rep. 822:) "The defendant, by its amended answer, now, for the FIRST TIME asserts that it was not acting as agent."

We draw the following conclusion from this rule as to the law of the case, viz: If, on the first or any subsequent appeal, the decision of the North Dakota Supreme Court upon the subject of agency became the law of the case in all its subsequent stages, then the trial judge, on the fourth trial, in deciding that the relation of principal and agent existed between plaintiff and defendant, did not err; because in this case he could only give his decision correctly and without error by following the law of the case, which, for the purposes of this action, was just as binding upon him as any other law in existence. It follows that since the trial judge did not err on the fourth trial in deciding the relation of the parties to be that of principal and agent, then the State Supreme Court did not err on the fourth appeal in affirming the judgment of the trial judge upon that point; for they could not lawfully reverse his decision, when that decision was in perfect harmony with the law of this case, as it had then become established. Plaintiff in error cannot be heard to say that the trial judge on the fourth trial was following an erroneous law of the case; because, not having sued out a writ of error in this Court upon the

judgment of the Supreme Court of North Dakota upon either the first, second or third appeals, it is not in a position to attack the validity of those judgments; and as far as plaintiff in error is concerned, those judgments are absolutely correct and without error. 80

We repeat:—Good faith toward defendant in error would have required plaintiff in error to have litigated the Federal question long before it attempted so to do, and to have claimed its so-called protection of the United States Statutes long before it did. 81

DAMAGE UNDER RULE 23.

We believe, under the circumstances of this case, we are justified in asking that damages of 10 per cent. upon the amount of the judgment as mentioned in Rule 23 of this court be awarded to defendant in error, as well as costs of this motion. The original action was commenced more than five years ago. It has already been passed upon on four appeals, a new trial having been awarded plaintiff below on each of the first three appeals. There should certainly be some end to litigation. When, in order to enforce a right it becomes necessary for a litigant to have four trials, four motions for new trials, and four appeals in the State Courts, extending over a period of nearly five years, and then to be obliged to await the deter- 82 83

84 mination of a writ of error in the highest tribunal of our land, in a case involving less than $2,000.00, it appears that the right is simply a right in theory, but not in practice. For the courts of the State to advise its citizen that he has a right in theory, but that it cannot enforce it for him, is to weaken the very foundations of the government.

85 The rate of interest in the converted notes was nine per cent. per annum, while the legal interest recoverable in this action is but seven per cent. (See end of fol. 51, Agreed Record.)

The language of the Supreme Court of North Dakota on the last appeal was explicit in stating that it would have arrived at the same conclusion

86 at which it did arrive, even had it conceded the contention of plaintiff in error on the Federal question sought to be raised. Plaintiff in error knew of this immateriality before it sued out the writ of error which brought the case here; but the case has been brought here, in spite of such immateriality of the Federal question,—apparently for delay only; and we therefore believe, in view of all

87 the circumstances, that the defendant in error should be awarded the damages mentioned, as well as dismissal of the writ of error and an affirmance of the judgment below.

On the question of damages of ten per cent. requested in our motion, we cite the following from the opinion of Mr. CHIEF JUSTICE WAITE, in Whit-

ney vs. Cook, 9 Otto, 607:—"Our experience teaches 88
us that the only way to discourage frequent appeals and writs of error is by the use of our power to award damages; and we think this a proper case in which to say that hereafter, more attention will be given to the subject, and the rule enforced both according to its letter and spirit. Parties 89
should not be subjected to the delay of proceedings for review in this Court, without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

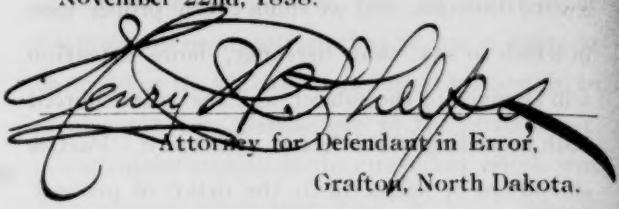
In the case at bar, it became necessary, by reason of plaintiff in error suing out the writ, for 90
us to either enter appearance personally on behalf of Mr. Anderson, crossing half the continent for that purpose, as the writer did in January last, or else employ assistant counsel at Washington, involving, perhaps as great an expenditure. We therefore ask allowance of ten per cent. damages, as mentioned in our motion. 91

As before indicated, we have not, upon this motion, argued the question of agency as thoroughly as we would expect to do, should it become necessary to argue the case on its general merits. We trust, however, that sufficient appears from the record to entitle defendant in error

92 to a dismissal of the writ of error and affirmance of the judgment below,

Respectfully submitted.

November 22nd, 1898.



Attorney for Defendant in Error,

Grafton, North Dakota.

FIRST NATIONAL BANK OF GRAND FORKS *v.* ANDERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 223. Submitted January 3, 1899. — Decided January 23, 1899.

The motion in this case to dismiss or affirm was founded upon the allegation that the judgment of the Supreme Court of the State rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no Federal question. This court, while declining to sustain the motion to dismiss, holds that there was color for it, and takes jurisdiction of the motion to affirm.

A national bank which, being authorized by the owner of notes in its possession to sell them to a third party, purchases them itself and converts them to its own use, is liable to their owner for their value, as for a conversion, even though it was not within its power to sell them as the owner's agent.

THIS was a motion to dismiss or affirm. The case is stated in the opinion.

Mr. Henry W. Phelps for the motion.

Mr. Burke Corbet and *Mr. W. E. Dodge* opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was an action at law brought by Anderson against the First National Bank of Grand Forks, North Dakota, in

the District Court for the First Judicial District of North Dakota, to recover the balance of the value of certain notes belonging to Anderson, which he alleged the bank had converted.

The notes amounted to seven thousand dollars, secured by mortgage, and had been endorsed, and the mortgage assigned, to the bank as collateral security for a loan of two thousand dollars, and Anderson had authorized the bank to sell the notes to a third party, take up the loan, and remit the balance. But, instead of doing this, the bank, according to Anderson, had undertaken to purchase the notes itself, and had not accounted for their value.

The cause was tried four times, and four times carried to the Supreme Court of North Dakota. 4 Nor. Dakota, 182; 5 Nor. Dakota, 80, 451; 6 Nor. Dakota, 497. On the fourth appeal a judgment in favor of Anderson was affirmed by the Supreme Court, and this writ of error to revise it was allowed, which defendant in error now moves to dismiss, or, if that motion is not sustained, that the judgment be affirmed.

By exceptions to the admission of certain testimony, taken on trial, and by the assignment of errors in the Supreme Court, plaintiff in error raised the point that, under the statutes of the United States in respect of national banks, it was not within its power to become the agent of defendant in error to sell the notes in question to a third person; and not within the power of its cashier, who conducted the transaction, to bind the bank by such contract of agency.

On the third appeal, 5 Nor. Dakota, 451, the Supreme Court ruled that "when a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its conceded power to collect the claim out of such collateral notes." But further, that even though the act of agency were *ultra vires*, yet if the bank, instead of selling the notes to a third person, had, without the owner's knowledge, sold them to itself, it would be guilty of conversion, and could be held responsible therefor. As to the cashier, the court held that on the

pleadings and facts in the case, his act was the act of the bank.

The Supreme Court in its opinion on the fourth appeal, 6 Nor. Dakota, 497, 509, among other things, said: "The question of *ultra vires* has been already discussed in a previous opinion. See 5 Nor. Dakota, 451. We have nothing to add on that point. The recent decision of the Federal Supreme Court cited by counsel for appellant, *California Bank* v. *Kennedy*, 167 U. S. 362, does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the record now before us. In its answer and the brief of its counsel the defendant admits that the writing of the letters referred to was its act and not the act of an unauthorized agent. By its own pleading and admissions it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

The argument urged in support of the motion to dismiss is, principally, that the judgment of the state Supreme Court rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no Federal question.

This contention is so far justified as to give color to the motion, although, under our decision in *Logan County National Bank* v. *Townsend*, 139 U. S. 67, we must decline to sustain it, while, at the same time, that case affords sufficient authority, if authority were needed, for an affirmance of the judgment.

There, bonds had been sold and delivered to a national bank at a certain price, under an agreement that the bank would, on demand, replace them at that or a less price; and the bank had refused compliance. In an action against the bank, its defence was in part that by reason of want of authority to make the alleged agreement and purchase, it could not be held liable for the bonds on any ground whatever. It was decided, however, that the national banking act did not give

a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without legal authority to make, and that although the bank was not bound to surrender possession of them until reimbursed to the full amount due to it, and might hold them as security for the return of the consideration paid, yet that when such amount was returned, or tendered back to it, and the return of the bonds demanded, its authority to retain them no longer existed; and, from the time of such demand and its refusal to surrender the bonds to the vendor or owner, it became liable for their value on grounds of implied contract, apart from the original agreement under which it obtained them.

Here, the bank was found to have itself purchased notes, which the owner had authorized it to sell to a third party, and, on general principles of law, it was held liable for their value as for a conversion, even though it was not within its powers to sell them as the owner's agent.

We are of opinion that the Supreme Court of North Dakota committed no error in the disposition of any Federal question, and its judgment is

Affirmed.